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No. 88-1769

# In the

# Supreme Court of the United States.

OCTOBER TERM, 1988.

MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY,
PETITIONER,

*v.*

VERMONT DEPARTMENT OF PUBLIC SERVICE, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT.

## PETITION FOR CERTIORARI.

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May 1, 1989

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## Questions Presented.

Whether the Vermont Supreme Court violated the Fourteenth Amendment procedural due process rights of the Petitioner Massachusetts Municipal Wholesale Electric Company (MMWEC) to assert and to prove substantial federal constitutional affirmative defenses as pleaded in its Answer to the Complaint in the underlying action in circumstances in which:

(1) the plaintiff-respondent Vermont Department of Public Service, as a consumer protection agency, sued to invalidate the power sales agreements (PSA) for the purchase of nuclear plant generating capability by a group of Vermont municipalities and Vermont Electrical Cooperatives from MMWEC upon theories (1) that the PSA was *ultra vires* and void as a matter of Vermont state law; (2) that it was violative of certain provisions of the Vermont Constitution; and (3) that it was violative of certain provisions of the United States Constitution;

(2) the defendant-petitioner MMWEC contested the state law theories and pleaded in its Answer the affirmative defenses that a judgment adopting the plaintiff's state law claim (a) would constitute a deprivation of property of MMWEC without due process of law as guaranteed by the Fourteenth Amendment; and (2) would burden and discriminate against MMWEC's activities in interstate commerce in violation of the commerce clause of the United States Constitution, Article I, § 8, clause 3;

(3) the parties presented and argued to the Vermont trial court cross-motions for summary judgment confined to the state law theories since a ruling against the plaintiff Department of Public Service on those grounds would efficiently conclude the litigation without need to resort to the federal constitutional claims and defenses;

(4) the Vermont trial court entered summary judgment in favor of MMWEC upon the state law grounds; and

(5) on appeal, the Supreme Court of Vermont reversed and entered judgment favorable to the Vermont Department of Public Service upon those state law grounds, and then denied MMWEC's motion for consideration of the federal constitutional affirmative defenses still not presented by the parties or addressed by either the state trial or appellate court.

## Parties to the Proceedings.

*Respondents, Plaintiffs*. The respondents below were the following plaintiffs.

1. The Vermont Department of Public Service.
2. The Village of Stowe, Vermont, an intervenor.
3. The Vermont Electric Cooperative, Inc., an original defendant subsequently converting to the position of the plaintiff Department.

*Petitioner, Defendant*. The Petitioner below was the defendant Massachusetts Municipal Wholesale Electric Company. In the proceedings below, MMWEC was joined by Vermont PSA codefendant participants (1) Village of Ludlow; (2) Village of Lyndonville; (3) Village of Morrisville; (4) Village of Northfield; and (5) Washington Electric Cooperative, Inc.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT.

## PETITION FOR CERTIORARI.

Petitioner Massachusetts Municipal Wholesale Electric Company respectfully prays that the Court issue a Writ of Certiorari to review the judgment of the Supreme Court of Vermont entered on September 27, 1988, and concluded by denial of a motion for reargument entered on January 30, 1989.

## Opinions Below.

The decision, opinion, and judgment of the Vermont trial court dated November 26, 1986, is not published as an official report. We include it in the Petition Appendix at pages 65a-85a.

The decision, opinion, and order for judgment by the Supreme Court of Vermont are yet unpublished in the Vermont Reports. Their full text appears at pp. 1a-24a of the Petition Appendix.

## Jurisdiction.

The Supreme Court of Vermont entered an order for final judgment on September 27, 1988. The petitioner filed a timely motion for reargument. That court entered a denial of the motion on January 30, 1989.

The Court derives jurisdiction of the case from 28 U.S.C. § 1257(3) authorizing *certiorari* jurisdiction, *inter alia*, in controversies decided by the highest court of a state "where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . ."

## Constitutional Provisions Involved.

This case involves the following constitutional provisions.

United States Constitution Art. 1, § 8, clause 3.

> The Congress shall have power . . . [t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes; . . . .

United States Constitution Amend. 5, final clause ("the takings clause") . . . .;

> nor shall private property [be] taken for public use, without just compensation.

United States Constitution Amend. 14, § 1 . . .;

> nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .

## Statement of the Case.

### 1. *MMWEC.*

MMWEC is a joint planning and joint action agency established under Mass. St. 1975, c. 775, as amended, through which municipal electric systems may acquire and finance electric capacity and energy. It is "a public instrumentality and the exercise of [its] powers . . . [is] deemed and held to be the performance of an essential public function." *Id.* § 2. It is empowered "to plan, finance, acquire, construct, improve, purchase, operate, maintain, use, share costs of, own, lease sell, dispose of or otherwise participate in electric power facilities or portions thereof" to meet the power requirements of its members. *Id.*, § 5(p). Pursuant to this authority, MMWEC has developed a bulk power supply system, consisting of ownership interests in various electric power facilities which serve, or are planned to serve, Massachusetts and New England.

Thirty-two Massachusetts municipalities currently participate as members of MMWEC, which is governed by a board of nine directors, two appointed by the Governor of Massachusetts and seven elected by the member municipalities. Member-

ship in MMWEC is voluntary; any Massachusetts city or town having a municipal electric department may become a member upon authorization by majority vote as defined in M.G.L. c. 44, § 1. Mass. St. 1975, c. 775, § 3(a). MMWEC is authorized to contract to sell, and its members and other utilities are authorized to contract to purchase, "all or a portion of capacity and output of one or more specific electric power facilities . . . ." *Id.*, § 6(a).

MMWEC finances its power supply system through the issuance of bonds under its general bond resolution adopted August 26, 1976, and supplemental resolutions (collectively "the bond resolution"). The principal and interest on the bonds are payable solely from, and secured by a prior lien upon and pledge of, the revenues derived by MMWEC from its ownership or operation of all projects for which bonds are issued and other available funds pledged under the bond resolution.

MMWEC's revenues consist primarily of payments received under power sales agreements ("PSA's") between MMWEC and participants in projects for which bonds are issued. A project is a financing acquisition vehicle through which MMWEC obtains ownership interest(s) in specified electric power facilities. Under a PSA, which becomes effective upon execution and delivery of agreements for 100 percent of a project's capability, MMWEC sells and each participant purchases a share of the project's capability, which is defined as "the amounts of electric capacity and energy, if any, which the Project is capable of producing at any particular time . . . ." Each participant is required to pay monthly its share of MMWEC's costs related to the project, including debt service and an additional 10 percent of debt service for deposit to a reserve and contingency fund. The PSA's require payments to be made whether or not the project is completed or operating and notwithstanding any subsequent suspension or interruption of output. The payments are payable solely from each partici-

pant's electric system revenues as an operation expense. Mass. St. 1975, c. 775, § 6(b).

2. *The Power Sales Agreements.*

The PSA's at issue relate to MMWEC's Project No. 6, which consists of a 6.001 percent ownership interest in the Seabrook, New Hampshire nuclear generating plant. Like MMWEC's power sales agreements for other projects, including the Stony Brook Intermediate Project, they are contracts for the purchase and sale of "Project Capability," which is defined in full as follows:

> "Project Capability" means *the amounts of electric capacity and energy, if any, which the Project is capable of producing* at any particular time (including times when the Project is not operable or operating or the operation thereof is suspended, interrupted, interfered with, reduced or curtailed, in each case in whole or in part for any reason whatsoever), less Project station use and losses, and shall be determined in accordance with the New England Power Pool Agreement, if any, and otherwise in accordance with Prudent Utility Practice [emphasis supplied].

The PSA's are "life-of-unit" contracts that run for the life of the project or until the bonds are paid off, whichever comes later. In the industry, they are often called "take-or-pay" contracts because they require the project participants, i.e., the utilities purchasing capacity and energy, to make monthly payments covering their respective pro rata shares of principal, interest and expenses without regard to whether, when or how much power they actually receive. In this connection, section 5(d) of the PSA's provides:

> *The participant shall make the payments to be made to MMWEC under this Agreement whether or not the Project or any Facility thereof is undertaken, completed, operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the output of the Project or any Facility thereof for any reason whatsoever* in whole or in part. Such payments shall not be subject to any reduction, whether by offset or otherwise, and shall not be conditioned upon the performance by MMWEC or any other Participant under this or any other agreement or instrument, the remedy for any non-performance being limited to mandamus, specific performance or other legal or equitable remedy [emphasis supplied].

Contracts for capacity and energy are a principal means by which many New England utilities meet their capacity requirements on a long-term basis. Such contracts — often called "unit" contracts — may be for capacity in and energy from an existing generating unit or in a proposed new unit. In either case, the unit contract entitles the purchaser to a stated percentage of the capacity and energy output, if any, of the unit for a term of years or the life of the unit, and the purchaser ordinarily is required to pay the same stated percentage of both the demand costs (i.e., overhead and capital costs) and energy costs (i.e., operating costs of producing the power, primarily fuel costs) of the unit. Virtually all long-term unit contracts contain a take-or-pay clause requiring the purchaser to pay the demand charges whether or not energy is actually delivered. Thus, if a proposed unit does not become operable, or if an existing unit becomes inoperable, the demand charges must be paid.

Section 3(a) of the PSA's obligates MMWEC, *inter alia*, to exercise "good faith" in accordance with "Prudent Utility Practice" to use "its best efforts: (i) to arrange for the financing, planning, engineering, design, acquisition, construction, operation and maintenance of the Project;" (ii) to obtain all necessary permits and regulatory approvals for the project; and (iii) "to issue and sell Bonds to finance" the project.

The PSA's also impose a variety of obligations on the participants, including several designed to ensure that participants will satisfy their payment obligations to MMWEC. These provisions include, *inter alia*: (1) section 5(c) requiring participants to charge rates sufficient to raise adequate revenues to meet their commitments under the PSA's and any other commitments constituting a charge or lien against their revenues, and limiting their payment obligations to revenues and other funds derived from their electric departments or systems; (2) section 12(d) providing, in the case of default by any participant, for pro rata increases in the shares of other participants, and thus in their corresponding obligations under the PSA's, up to an accumulated maximum of 25 percent; and (3) section 18 providing for arbitration of disputes arising under the PSA's and requiring that all payments be made when due notwithstanding the pendency of an arbitration proceeding.

The PSA's by their terms do not create or grant to MMWEC a security interest in any funds or property of the participants. The participants' obligations under the PSA's are treated as operating expenses payable out of their general system revenues. It was, and is, the intention and understanding of MMWEC and the participants that the PSA's do not grant to MMWEC a security interest in the revenues, profits or property of the participants.

In the mid and late 1970's, it was not possible for the smaller utilities (or their joint action agencies) to achieve the benefits accruing under long-term contracts for capacity and energy

from new generating units without simultaneously undertaking a proportionate share of the risks of construction of such units. No utility sponsoring a major new generating unit in the 1970's was prepared to sell a share of the capacity of such unit to any utility which was not also prepared to share in construction and financing risks. In short, the municipal and cooperative electric utilities do not have available to them the option of entering into long-term contracts for capacity and energy without also undertaking a proportionate share of the financing and construction risk of a project.

MMWEC has financed its joint ownership share of the Seabrook nuclear generating project through issuance of tax-exempt revenue bonds. The participants in MMWEC's several projects relating to Seabrook, including Project 6, in turn enter into unit contracts with MMWEC for the purchase of capacity and energy from MMWEC's ownership share of the Seabrook generating unit. As explained in the preceding section, so-called "take-or-pay" contracts require the participants to make the contractualy specified payments to MMWEC even if the underlying generating units are never completed or never operate. The take-or-pay provisions of the PSA's are necessary in order to enable MMWEC to sell its bonds to investors. By virtue of the take-or-pay provisions, the participants undertake their proportionate share of the financing construction risk of the underlying generating units, which is the price they pay for the rights to capacity in and energy from those units provided to them by the contracts.

Unit contracts containing take-or-pay provisions are common for the electric industry generally and in Vermont in particular. For example, Vermont municipal and cooperative utilities obtain power from the Vermont Yankee nuclear generating station pursuant to take-or-pay contracts that require payment obligations to be made regardless of whether the unit was ever completed or ever operated at full capacity. Vermont

utilities obtain power from MMWEC's Stony Brook Phase I Intermediate generating unit pursuant to virtually identical contracts. Vermont municipal and cooperative utilities also have entered into take-or-pay contracts with Public Service Company of New Hampshire for power from its Merrimack Unit No. 2.

3. *Approval of the PSA's by the Vermont Public Service Board.*

In 1965, acting under 30 V.S.A. §§ 202, 203, 206, 209, 217, 2807, and 3039a, the Vermont Public Service Board ("PSB" or the "Board") issued its General Order No. 45, which requires all private, municipal and cooperative electric utilities to give written notice to the PSB ninety (90) days in advance of entering into certain contracts, including, *inter alia,* "any contract for the purchase of capacity in, or energy from, any electrical generating or transmission facility for ultimate consumption within the State of Vermont." The notice must be accompanied by a copy of the proposed contract.

The PSB's opinion in support of the order describes the then anticipated future need for additional electric energy in the state, and finds "that the efficient and economical way to generate and transmit sufficient electrical energy to meet the increasing demand will be through the construction of large-scale facilities for generation and transmission," and "that the plans of electric utilities for new generation and transmission facilities to serve Vermont consumers must be coordinated on a statewide basis . . . ." Noting that 30 V.S.A. § 202 makes it "the responsible planning agency of the state for the purpose of obtaining . . . proper utility service at a minimum cost under efficient and economical management," the PSB ruled that "it is our unavoidable duty to coordinate the planning of electric utilities for new generation and transmission facilities to serve the people of Vermont." It concluded: "If any proposed

commitment appears to neglect desirable economies of scale or the needs of other electric utilities, we shall have an opportunity to counsel modification of the proposed commitment before it is too late to change it."

All the Vermont participants in Project No. 6 followed the procedure mandated by General Order No. 45. Furthermore, in VEC's case, the PSB issued a written opinion in November 1979 analyzing the factors involved, pointing out the dangers, and concluding on balance that participation was appropriate. The PSB also required that its opinion be circulated to all members of the cooperative.

The PSB staff undertook a careful review of the PSA's including the take-or-pay risk (as all parties acknowledged below — Supplemental Printed Case record at 299-301; 765 *et seq.*).[1]

4. *Delays and Cost Overruns in the Construction of the Seabrook Power Plants.*

As of the formation of the Vermont PSA's in 1979, the prime owner (Public Service Company of New Hampshire) estimated the completion dates of the two contemplated nuclear generating plants to be April, 1983 and February, 1985, respectively; and the total cost to be $2.6 billion. In early 1981 the total cost estimate rose to $3.12 billion. As of November, 1982, the estimated plants completion dates became December, 1984, and March, 1987, respectively; and the total cost estimate $5.12 billion. In 1984 the investors and owners found it necessary to terminate construction of the second plant. By early 1985 estimates of the completion date of the remaining plant had lengthened to 1987, and of the total cost to $6 billion.

[1] For specific bond issues to finance Project 6, MMWEC was required to seek and receive the approval of the Massachusetts Department of Public Utilities. It is undisputed that it received issuance approvals in 1981, 1985, and 1987; and a particular denial in 1985.

*5. The Present Litigation.*

In October of 1985 the Vermont Department of Public Service, as a consumer protection agency, commenced the present action in the Vermont Superior Court against MMWEC and the six Vermont Project 6 participants (the four villages and the two cooperatives). The major theories of its complaint were (1) that all the Vermont participants had lacked authority to join in the PSA's six years earlier and had acted in excess or violation of various state legislation; (2) that the PSA's deprived ratepaying customers of various property rights afforded by the Vermont Constitution; and (3) that the PSA's deprived ratepaying customers of property rights protected by the Due Process Clause of the Fourteenth Amendment. Petition Appendix at 46a-55a.[2]

In answer MMWEC asserted various affirmative defenses, including the claims (1) that the requested invalidation of the PSA's under Vermont state law would deprive it of property in violation of the Due Process Clause of the Fourteenth Amendment (Tenth Defense, Petition Appendix, *infra* at 57a); and (2) that such an invalidation would burden and discriminate against its activities in interstate commerce in violation of the Commerce Clause (Twelfth Defense, Petition Appendix, *infra* at 58a).

Upon the state law theories of *ultra vires* action by the Vermont participants, the parties filed cross motions for summary judgment (Petition Appendix, *infra* at 59a-64a), formed an agreed record, and briefed the state law issues to the Superior Court. The trial court rejected the plaintiff's state law claims and entered summary judgment in favor of the defendant MMWEC (*id.* at 65a-85a). On appeal, the Vermont Supreme

[2] The Complaint extended to additional common law theories never developed in the subsequent litigation below. See Petition Appendix, *infra* at 52a-55a.

Court held the PSA's to be invalid under state law and therefore void *ab initio* (*id.* at 18a, 22a).

The state supreme court reasoned that Vermont statutes did not permit its participants to engage in the purchase of power capability by means of take-or-pay contracts but only in the purchase of actual power supplies; and that participation in such agreements by municipalities and cooperatives without an adequate measure of control in contractual decisionmaking violated the common law prohibition against the delegation of a public corporation's "legislative" authority over its expenditures (*id.* at 6a-22a).

Because the cross motions and arguments confined themselves to the potentially dispositive grounds of state law, the parties and the courts did not address the federal law claims asserted in the pleadings.

By Motion for Reargument MMWEC reasserted that "[i]nvalidating the PSA's on the basis of Vermont law impermissibly burdens interstate commerce and violates the Takings Clause and the Due Process Clause of the United States Constitution" (Petition Appendix at 25a, 27a). The Vermont and Supreme Court then denied the Motion without comment (*id.* at 28a).

## Argument.

For the following reasons the Court should grant the writ.

### I. The State Court's Preclusion of MMWEC's Federal Constitutional Defenses Constitutes a Violation of Procedural Due Process Guaranteed by the Fourteenth Amendment.

The refusal of the Vermont Supreme Court to entertain MMWEC's affirmative federal constitutional defenses, and its

refusal to permit the Vermont Superior Court to entertain them, denies MMWEC the procedural due process protected by the Fourteenth Amendment. A state court may not prohibit or effectively prevent consideration of federal constitutional claims properly asserted by a state court litigant. *Laurence* v. *State Tax Commission*, 286 U.S. 276, 282 (1932); *Ward* v. *Love County*, 253 U.S. 17, 22 (1920); *Postal Telegraph Cable Co.* v. *Newport*, 247 U.S. 464, 475-476 (1918); and *Enterprise Irrigation District* v. *Farmers' Mutual Canal Co.*, 243 U.S. 157, 164 (1917).

A particularly strong corrollary of this doctrine is that state court rules or practices of pleading and procedure may not function unreasonably or arbitrarily to avoid decision of a proper federal law claim. *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 232-234 (1969) (unreasonable notice requirement); *Parrot* v. *City of Tallahassee*, 381 U.S. 129 (1965) (*per curiam*) (supposedly defective certification of trial court record); *Douglas* v. *Alabama*, 380 U.S. 415, 421-422 (1965) (alleged abandonment of recurrent objection); *N.A.A.C.P.* v. *Alabama*, 377 U.S. 288, 293-302 (1964) (arbitrary state appellate briefing rule forfeiting federal claim argument); *Wright* v. *Georgia*, 373 U.S. 284, 289-291 (1963) (same); *Staub* v. *Baxley*, 355 U.S. 313, 320 (1958) (rejecting state court requirement that federal constitutional challenge to municipal ordinance specify sections rather than provision as a whole); and *Davis* v. *Wecksler*, 263 U.S. 22, 24 (1923) (rejecting state law practice ruling of waiver of federal law defense) (per Holmes, J.: "The state courts may deal with [practice and pleading] as they think proper in local matters but they cannot treat [them] as defeating a plain assertion of federal right. The principle is general and necessary.") The central point has remained that "state procedural requirements which are not strictly or regularly followed" cannot bar consideration of the federal law claim or review of the treatment of that claim by this Court. *Barr* v. *City of Columbia*, 378 U.S. 146, 149 (1964).

The banishment of the federal law claim in the present instance is especially arbitrary. For in the cited instances the state's highest court typically invoked a technical rule of pleading or procedure as justification. Here the Vermont Supreme Court offers no rationale whatsoever for the ejection of MMWEC's constitutional defenses from the case (Petition Appendix at 28a).

## II. The Petitioner's Federal Constitutional Claims are Substantial and Therefore Worthy of Consideration by the State Court System.

MMWEC's affirmative defenses that invalidation of the PSA's under state law would violate (1) its substantive due process property interests, and (2) its right to engage in interstate commerce without discriminatory and burdensome interference have substance and warrant fair consideration by the state courts below.

### A. *Invalidation of the Contracts Deprives MMWEC of Property in Violation of the Due Process Clause of the Fourteenth Amendment.*

The decision of the Vermont Supreme Court deprives MMWEC of a substantial property interest without due process of law. The leading decisions of this Court turn such a deprivation upon "the character of the government action, its economic impact, and its interference with reasonable investment-backed expectations." *Prune Yard Shopping Center* v. *Robbins*, 447 U.S. 74, 83 (1980); *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978).[3]

[3] The definition of a deprivation under the Due Process Clause, the Takings Clause of the Fifth Amendment (as incorporated into the Due Process Clause of

The character of the governmental action here supplies scant justification for the disruption of the multilateral, interstate contractual arrangement comprised by the PSA's. The Vermont Supreme Court does not offer any public purpose objective requiring the invalidation of the Agreements and their cumulative reliances, beyond the excusal of the Vermont participants from their financial duties under the contracts (Petition Appendix at 6a-22a). This Court's decisions indicate that the character of the governmental action becomes more acceptable if it is a "public program adjusting the benefits and burdens of economic life to promote the common good," *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978); and less acceptable if it is a measure to compel "some people alone to bear the public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). *See also Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 163 (1980).

The decision of the Vermont Supreme Court falls within the latter category. In substance it simply releases altogether the home town contractual participants from the onerous eventualities of the Seabrook-based PSA's and transfers the detriments of the arrangement to their Massachusetts counterparts. The action is not an adjustment of benefits and burdens in the

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the Fourteenth), and the Contract Clause have converged at the bedrock criteria measuring (1) the vested strength and objectively reasonable expectation characterizing the endangered private property interest; (2) the magnitude of the diminution or deprivation by the government; and (3) the countervailing strength of the governmental purpose. See *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 241 & n.12 (1978); *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 14-15 (1977); *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 424, 448 (1934) (per Hughes, C.J.); *Note, The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 98 (1978) (comparing the Takings Clause and the Contract Clause); and *Note, The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 84 (1977) (to the effect that decisional law has assimilated the Contract Clause criteria into the Takings and Due Process standards).

common good, but rather a wholesale desertion of legal and equitable responsibility for partisan benefit. The court offers remarkably little Vermont precedent for its reasoning; substitutes analogies for holdings in its reference to decisions from other jurisdictions; and synthesizes a "non-delegation" doctrine reducing to the proposition that Vermont municipalities may break any contractual commitment in which their participation seems inadequate to protect their financial risk.

The economic impact upon MMWEC and the Massachusetts contractual participants in the Project 6 Seabrook PSA is massive. The Vermont decision divests MMWEC prospectively of 14.9 percent of the contract and exposes it retrospectively to claims of restitution of the 20 percent payments of the Vermont participants over the prior six years (1979-1985) of the contracts, an exposure approximating 6.2 million dollars. These consequences severely undermine the capacity and willingness of the remaining Massachusetts participants to persevere in their contractual obligations, and in ultimate consequence the capacity of MMWEC to survive financially as a privately funded public instrumentality designed to furnish large quantities of electrical power to public consumers at reduced cost.

Finally the Vermont decision interferes drastically with reasonable investment backed expectations of MMWEC, other PSA participants, and the majority of the Vermont participants themselves. The investments were substantial, or in fact open-ended on the part of all contractors; and the expectations of legal validity were completely reasonable. All bond counsel opined favorably. No Vermont statutory or decisional law prohibited the arrangement, as evidenced especially by the paucity of Vermont authority marshalled by its highest court in the decision below. Congruent PSA's were already operating for other projects (the Stony Brook Phase 1 Intermediate generating unit; the Vermont Yankee generating station; and the Merrimack Unit No. 2 plant, all cited above) of Vermont partici-

pants, distinguishable not by any legal feature but only by their better financial results. Indeed, it was undisputed below that the plaintiff Vermont Department of Public Service, in its capacity as an electric wholesaler, had employed take-or-pay contracts with Vermont utilities (Supplemental Printed Case record at 641; 644-645; 655-656). Finally, and most telling, the Vermont Public Service Board as *parens patriae* approved the Project 6 PSA in 1979 in accordance with its General Order No. 45, a particular assurance to MMWEC and the Massachusetts participants from the agency specifically designed to protect the interests of the Vermont participants.[4]

In short, all three indicia of a due process deprivation are visible in the present case. They warrant, at a minimum, a fair opportunity for adjudication in the Vermont courts.

B. *Invalidation of the Contracts Burdens and Discriminates Against MMWEC's Activities in Interstate Commerce.*

Discriminatorily protectionist state action violates the Commerce Clause. *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 335, 339 (1982) (state commission indicated that its order was "designed to gain an economic advantage for New Hampshire citizens at the expense of . . . customers in neighboring states"); *Raymond Motor Transport, Inc.* v. *Rice*, 434 U.S. 429, 446-447 (1978) (discriminatory state regulation satisfying in-state constituency pressures); *American Trucking Association, Inc.* v. *Scheiner*, 107 S.Ct. 2829, 2840 (1987) (facially neutral axle tax imposed a heavier burden on out-of-state businesses and, in effect, placed a financial barrier at the state borders); *Middle S. Energy, Inc.* v. *Arkansas Public Service Commission*, 772 F.2d 404, 416-417 (8th Cir. 1985),

[4] This safety mechanism, in particular, generated reasonable reliance as the functional equivalent of a declaratory judgment. Again, no legal term of the PSA's varied between 1979 and 1985; only the business consequences of the contractual investment.

*cert. denied*, 474 U.S. 1102 (1986) (state's real concern was the adverse economic impact of interstate energy agreements on Arkansas, as evidenced in various hearings; state may not constitutionally close its borders to importation of electricity); and *Tri-State Generation and Transmission Association* v. *Public Service Commission of Wyoming*, 412 F.2d 115, 119 (10th Cir. 1969), *cert. denied*, 397 U.S. 1043 (1970) (holding that a state commission's directives effectively preventing Wyoming utilities from paying their contract obligation to an interstate supplier constituted an impermissibly severe impact on interstate commerce).

The *New England Power* and *Middle S* decisions present features similar to those of the present case. In the former, the New England Power Company was a New Hampshire based generator and transmitter of wholesale electricity supplying mainly Massachusetts and Rhode Island customers and servicing less than six percent of the New Hampshire population. A state statute prohibited the exportation of electrical energy without approval of the New Hampshire Public Utilities Commission; and authorized the Commission to withhold approval if it determined that the public could reasonably require use of the energy within the state. *Id.* at 335. This Court concluded that the export ban comprised "precisely the sort of protectionist regulation that the Commerce Clause declares off limits to the states;" that the Commission's order was "designed to gain an economic advantage for New Hampshire citizens at the expense of New England Power's customers in neighboring states;" and that the order inflicted a "direct and substantial" burden on interstate commerce transactions. *Id.* at 339.

In the *Middle S* case the Arkansas Public Service Commission sought to invalidate contracts executed by the in-state Arkansas Power and Light Company for the purchase of power from, or payment for construction of, an out-of-state power plant. Arkansas Power and Light executed a PSA-type contract

with the owner-builder of the planned nuclear power plant, by which it committed to purchase power yet to be generated; to pay the owner agreed sums in advance for application to its (the owner's) operating expenses even if the plant were not yet generating electrical power; and to have the advances credited to the eventual purchase of actual power. This financing arrangement was "essential" to the construction of the project. 772 F.2d at 406. Arkansas Power and Light then entered a wholesale power sales agreement with an obligation to purchase specified shares of power in the future. *Id.* at 407-408. The state commission predicted that the utility's commitments would result in "dramatic" rate increases, place an "intolerable burden" on customers, and have a "crippling effect" on the local economy. It proposed to invalidate the project contract *ab initio*. The Court of Appeals for the Eighth Circuit affirmed permanent injunctive relief against the state commission and affirmed the underlying finding that the commission's action revealed home-based discriminatory intent and effect, with reliance upon *New England Power*. *Id.*

The parallels between those cases and the present are strong: (1) the removal from the state of high-cost electricity and high-cost payments for future power through invalidation of interstate agreements; (2) the exportation of financial burdens to sister states; and (3) the imposition of financial costs upon the interstate electricity supplier.

So here, by attenuated statutory construction and newly minted common law, the Vermont Supreme Court has expelled the interstate Power Sales Agreements from its borders; extracted the state's municipalities and cooperatives from their financial obligations; transported those obligations in aggravated degree to utilities and consumers a neighboring state; and severely exacerbated the costs and financial exposure of the interstate supplier. The judicial use of state statutory and common law to subvert the purpose of the Commerce Clause is

no more constitutional than the parochial use of a state's legislative and regulatory powers for the same illegitimate end.[5] Here, too, at the least, the Petitioner's Commerce Clause defense is entitled to a fair hearing by the Vermont courts.

## Conclusion.

For the foregoing reasons the Massachusetts Municipal Wholesale Electric Company respectfully urges the Court to grant a Writ of Certiorari to the Supreme Court of Vermont to determine whether that court unconstitutionally foreclosed the presentation of the Petitioner's affirmative federal law defenses in the state court proceedings below.

Respectfully submitted,

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May 1, 1989

[5] The Commerce Clause is an affirmative expression of congressional authority. It does not confine itself to the prohibition of state legislation alone, but by language and purpose extends to state action broadly which might unjustifiably obstruct its objective of a national commerce. Thus the Vermont judiciary enjoys no exemption from the Commerce Clause of the kind in which it could seek shelter from the Contract Clause. Contrast *Tidal Oil Company* v. *Flanagan*, 263 U.S. 444, 451 (1924).

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## APPENDIX A

SUPREME COURT
FORM NO. 1

VT. SUPREME COURT
FILED IN CLERK'S OFFICE
SEP 27 1988

ENTRY ORDER

SUPREME COURT DOCKET NO. 86-555
April Term, 1987

APPEALED FROM:
Washington Superior Court
Docket No. S412-85WnC

Vermont Department of Public Service

*v.*

Massachusetts Municipal Wholesale
Electric Co., et al.

In the above entitled cause the Clerk will enter:

The superior court's grant of defendants' motions for summary judgment is reversed and judgment for plaintiffs is entered.

FOR THE COURT:
Frederic W. Allen, Chief Justice
Concurring:

Louis P. Peck, Associate Justice
Albert W. Barney, Chief Justice
(Ret.) Specially Assigned
F. Ray Keyser, Associate Justice
(Ret.) Specially Assigned
Stephen B. Martin, Superior Judge,
Specially Assigned

**NOTICE: This opinion is subject to motions for reargument under V.R.A.P. 40 as well as formal revision before publication in the Vermont Reports. Readers are requested to notify the Reporter of Decisions, Vermont Supreme Court, 111 State Street, Montpelier, Vermont 05602 of any errors in order that corrections may be made before this opinion goes to press.**

86-555

Vermont Department of Public Service

v.

Massachusetts Municipal Wholesale Electric Co., et al.

Supreme Court

On Appeal From
Washington Superior Court

April Term, 1987

John P. Meaker, J.

Jeffrey L. Amestoy, Attorney General, William E. Griffin, Chief Assistant Attorney General, and Michael Marks and Dinah Yessne, Special Assistant Attorneys General, Montpelier, for plaintiff-appellant Department of Public Service

Edward B. French, Jr., David B. Stackpole Law Offices, Stowe, for plaintiff-appellant Village of Stowe

Michael L. Burak and John T. Anderson of Goldstein, Manello, Burak & Gabel, Burlington, for plaintiff-appellant Vermont Electric Cooperative

Parker, Lamb & Ankuda, P.C., Springfield, and Daniel O. Mahoney and Jeffrey F. Jones of Palmer & Dodge, Boston, Massachusetts, for defendant-appellee Massachusetts Municipal Wholesale Electric Co.

Stephen C. Walke, Jr. and Ralph W. Howe, III of Paterson, Walke & Pratt, P.C., Montpelier, for defendants-appellees

Washington Electric Cooperative and Village of Ludlow, Lyndonville, Morrisville and Northfield

Rubin, Rona, Kidney & Myer, Barre, for amicus curiae Vermont Public Interest Research Group, Inc.

McKee, Giuliani & Cleveland, Montpelier, for amicus curiae Vermont League of Cities and Towns

PRESENT: Allen, C.J., Peck, J., and Barney, C.J. (Ret.), Keyser, J. (Ret.) and Martin, Super. J., Specially Assigned

ALLEN, C.J. In 1979, four Vermont municipalities and two electric cooperatives contracted with the Massachusetts Municipal Wholesale Electric Company (MMWEC) for shares of the power generating potential of its Project No. 6. This project consisted of a 6.001 percent ownership interest in two nuclear power plants to be built in Seabrook, New Hampshire. In 1985, the Vermont Department of Public Service (Department) filed a complaint in Washington Superior Court, alleging that the Vermont utilities had violated statutory and common law in executing the contracts with MMWEC. The superior court granted summary judgment for defendants, and this appeal ensued. We reverse and hold that the contracts were void ab initio.

Although the underlying litigation was designated formally as a complex action under the provisions of V.R.C.P. 16.1, only a brief summary of the procedural history is necessary here. The Department filed its complaint, seeking declaratory and injunctive relief, on October 18, 1985. The Village of Stowe intervened shortly thereafter as a plaintiff, and the Vermont Electric Cooperative (VEC), originally a defendant, was denominated a plaintiff after accepting plaintiffs' position. The defendants include MMWEC and the Villages of Ludlow, Lyndonville, Morrisville, and Northfield, as well as the Washington Electric Cooperative (WEC).

MMWEC is a joint planning and action agency, incorporated under the terms of special enabling legislation in Massachusetts, through which municipal electric systems may finance and acquire supplies of electrical power or power sources. Its membership comprises thirty-four Massachusetts municipalities; it is governed by a board of nine directors, two appointed by the Governor and seven elected by the Massachusetts-member municipalities. There is no provision for representation of the Vermont municipalities or cooperatives on the MMWEC Board.

In 1976, MMWEC began development of a bulk power supply system consisting of ownership interests in various existing and planned electric power facilities. Included among the planned facilities were Seabrook nuclear plants No. 1 and No. 2. MMWEC obtained a fractional ownership interest in the two plants and designated this interest as Project No. 6. The contracts at issue here relate to this project.

The basic theory under which the parties operate is as follows: MMWEC finances its construction and other costs by issuing bonds; in return, the participants commit a sufficient portion of their utility revenues to cover MMWEC's monthly debt service on the bonds. To this end, MMWEC and public utilities from several states, including the Vermont participants, executed "power sales agreements" (PSAs) regarding Project No. 6.[1]

Under the agreements, which became effective upon the execution and delivery of PSAs covering 100 percent of the project, participants purchased shares of "project capability." "Project capability" is defined in the PSAs as "the amounts of electric capacity and energy, if any, which the Project is capable of producing at any particular time (including times when

[1] Plaintiff Village of Stowe entered into a collateral agreement with defendant Village of Morrisville, agreeing to assume a portion of Morrisville's Project No. 6 obligation.

the Project is not operable or operating or the operation thereof is suspended, interrupted, interfered with, reduced or curtailed, in each case in whole or in part for any reason whatsoever), less Project station use and losses . . ."

Each month, the participants are required to pay their proportional shares of MMWEC's costs relating to the project, including debt service; an additional ten percent of the debt service figure is paid monthly for deposit in a reserve and contingency fund. MMWEC is empowered to fix these monthly payments so as to provide revenues sufficient to meet its obligations. The participants are not required to make payments from any source other than revenues derived from their electric departments or systems, but they are obligated to fix their rates in amounts at least sufficient to meet their obligations under the PSAs. Participants also agree to pay any unrelated debts or amounts which might otherwise constitute a charge or a lien upon their revenues, and, except in certain circumstances, they forego the right to issue any of their own revenue bonds without first providing for the payment of all operating expenses and the monthly payments to MMWEC. Further, the agreements include a so-called "step-up" provision, under which each participant's monthly obligation will increase proportionately to cover MMWEC's costs should any participant default.

The participants must make the scheduled monthly payments to MMWEC without regard to whether the project is completed, operating, or even undertaken. Such provisions are known variously as "take-or-pay" or "hell or high water" because of the unconditional nature of the obligation imposed. Here, the monthly payments are required in their full amounts, even if no electricity is ever produced. Participants do not acquire any ownership interest in the physical plant.

The agreements provide further that MMWEC, acting in good faith and in accordance with the tenets of "Prudent Utility

Practice" (a term defined in the agreements), will use its best efforts to arrange for the financing, planning, engineering, design, acquisition, construction, operation and maintenance of the project; obtain all necessary permits and rights; and issue revenue bonds to finance all costs. While the Vermont participants share in the costs and risks of the project, they retain no decision-making power with respect to the incurrence of debt, plant construction, or operation.

In the superior court, the parties filed an extensive stipulation of facts, a procedural stipulation, and subsequent motions and cross-motions for summary judgment. After hearing, the court granted summary judgment in favor of defendants. The judgment was entered pursuant to V.R.C.P. 54(b) on the cross-claims for summary judgment.

Three principal questions are presented on appeal. First, plaintiffs contend that the lower court erred in concluding that the Vermont utilities had statutory authority to enter into contracts that include take-or-pay provisions. Second, we must determine whether the PSAs are void, in any event, because the participants attempted to transfer all decision-making authority with regard to the project to MMWEC, thereby violating the fundamental principle of nondelegation. Finally, plaintiffs maintain that the municipal utilities could not legally incur the financial obligations at issue without obtaining voter approval and that the cooperatives were required to obtain the approval of the Public Service Board.

I.

In concluding that the Vermont participants were authorized to enter into the PSAs, the superior court relied upon 30 V.S.A. § 4002, which provides in part that:

> Any cooperative or municipal electric utility shall have:
>
> . . .

> (2) authority to act in participation with other such utilities in arranging for the purchase of supplies of capacity and energy from other utilities, either within or without the state of Vermont, including purchases from private electric utilities, municipal electric utilities, cooperatives, associations of utilities, or public authorities; . . .

The plain language of this section authorizes Vermont utilities to act jointly in obtaining supplies of electrical capacity and energy. Here, however, the participants in the project are not involved in the ordinary purchase of capacity and energy. Instead, they have obtained shares of "project capability," defined in the agreements as "the amounts of electric capacity and energy, *if any,* which the Project is capable of producing at any particular time. . . ." (emphasis supplied). Section 4002 provides basic joint purchasing authority; it does not follow that municipal and cooperative utilities are free to enter into speculative contracts that impose unconditional, long-term obligations in the face of "if any" disclaimers. The statute authorizes joint purchases of *supplies* of capacity and energy. It is contemplated that these supplies will be ascertainable in amount and that contractual remedies will be available in the event of any deficiencies.

A comparison with the provisions of two other statutes illustrates the limited scope of the plain language in question. 30 V.S.A. § 604(2) provides that, *in addition* to the general powers granted to municipal utilities, Burlington and Lyndonville may enter into utility contracts, "including, without limitation, contracts for the payment of obligations imposed without regard to the operational status of a facility or facilities. . . ." In a clearer grant of take-or-pay contracting authority, Chapter 84 of Title 30 establishes the Vermont Public Power Supply

Authority (VPPSA). Section 5013(a) of that chapter, entitled "Special powers," empowers the VPPSA and utilities to contract on a basis that "may provide for the payment of unconditional obligations imposed without regard to whether a project is undertaken, completed, operable or operating. . . ." In contrast to these express grants of special powers, § 4002 merely authorizes ordinary, joint purchases of supplies of capacity and energy.

Our analysis is buttressed by decisions in other jurisdictions relating to virtually identical contracts. These cases all involve PSAs executed by the Washington Public Power Supply System (WPPSS) and public utilities of several northwestern states. In *Chemical Bank* v. *Washington Public Power Supply System* 99 Wash. 2d 72, 666 P.2d 329 (1983) (*Chemical Bank I*), the Supreme Court of Washington held that statutory authority to purchase "electric current for sale and distribution . . ." did not empower the Washington participants in the PSAs to purchase project capability. *Id.* at , 666 P.2d at 334-35. That court stated:

> [T]he purchase of "project capability" under this agreement is essentially an unconditional guarantee of payments on [WPPSS's] revenue bonds, secured by a pledge of the participants' utility revenues, in exchange for a share of any power generated by these projects. The agreement expressly provides for the possibility that no electricity will be generated and that participant payments will be due even if the project is not completed. The unconditional obligation to pay for no electricity is hardly the purchase of electricity. We hold that an agreement to purchase project capability does not qualify as a purchase of electricity.

*Id.* at , 666 P.2d 335.

The Washington court later granted a motion to reconsider its decision in *Chemical Bank I* because of the importance of the issues involved and because of the complexity of the statutory issue. After considering several newly raised facts and arguments, the court affirmed its earlier holding. *Chemical Bank* v. *Washington Public Power Supply System,* 102 Wash. 2d 874, , 691 P.2d 524, 537 (1984) (*Chemical Bank II*).

In *Asson* v. *City of Burley,* 105 Idaho 432, 670 P.2d 839 (1983), the Supreme Court of Idaho reached a similar conclusion. Under Idaho statutes, municipalities are authorized to " 'acquire, own, maintain and operate electric power plants, purchase electric power, and provide for distribution to the residents of the city.' " *Id.* at 443, 670 P.2d at 850. The Idaho court reviewed these and other enactments and stated that:

> [W]e can find no statutory authorization for the purchase of "project capability" where such purchase comprehends the payment of long-term indebtedness for which no power may be supplied, and for which no ownership interest is acquired. The municipality is neither acquiring, owning, maintaining, or operating a plant, nor purchasing electrical power. It is underwriting another entity's indebtedness in return for merely the possibility of electricity.

*Id.*

On the other hand, after reviewing identical PSAs, the Supreme Court of Oregon ruled that Oregon participants had not exceeded their authority in signing the agreements. *DeFazio* v. *Washington Public Power Supply System,* 296 Or. 550, , 679 P.2d 1316, 1345 (1984). The *DeFazio* court observed that "[i]t is not obvious why the legal character of the transac-

tion should differ if the power plants were completed at great cost but produced only a small fraction of the expected electricity rather than none." *Id.* at , 679 P.2d at 1335. This observation obfuscates the true distinction between take-or-pay agreements and other power supply contracts, however. Ordinarily, electrical power contracts are agreements to purchase verifiable supplies of energy, and contractual remedies are available for any shortfalls. It is for the legislature, not the courts, to define limits upon municipal purchasing and financing authority. In any event, *DeFazio* is wholly distinguishable because it was explicitly based on Oregon's constitutional home rule provision, under which a city is free to write its own charter and define for itself what functions and powers, consistent with statutes and the constitution, its agencies will have. *Id.* at , 679 P.2d at 1336.

In *City of Springfield* v. *Washington Public Power Supply System,* 752 F.2d 1423 (9th Cir. 1985), the Ninth Circuit concluded that, under certain circumstances, a contract with take-or-pay provisions could in fact represent a purchase of electricity. The court scrutinized a three-party net billing agreement, also relating to WPPSS. The third party to the agreement was the Bonneville Power Administration (BPA), and the contract included a key provision not present in other cases: while the participants were obligated to pay WPPSS whether or not they actually received power from the project, they either received a refund from the BPA or credit for those payments as against power actually supplied by the BPA. Because the participants received either electricity or a cash refund equal to their payments to WPPSS, the court concluded that the underlying arrangement was in fact a contract for the purchase of electricity. *Id.* at 1429.

We hold that the lower court erred in concluding that 30 V.S.A. § 4002 empowered the Vermont participants to enter into the PSAs. Defendants argue, in the alternative, that certain

other statutory sections contain implicit grants of such contracting power, but we need not consider this contention because we find the PSAs to be void on other grounds.

II.

Under the provisions of the PSAs, all decision-making power with regard to the project rests with MMWEC; the Vermont participants retain no voice in decisions to incur debt, to commence operation of the plant, or to decommission the plant. They have abdicated all management responsibility for and have obtained no ownership interest in the project. Plaintiffs maintain that these provisions constitute an impermissible delegation of authority to MMWEC. We agree.

A.

Our analysis begins with the agreements executed by the municipal participants. This Court has long adhered to the "deep-rooted principle of law that the delegate of power from the sovereign cannot without permission recommit to another agent or agency the trust imposed upon its judgment and discretion." *Thompson* v. *Smith*, 119 Vt. 488, 501, 129 A.2d 638, 647 (1957). In *Wabash Railroad Co.* v. *City of Defiance*, 167 U.S. 88 (1897), the United States Supreme Court stated that "the legislative power vested in municipal bodies is something which cannot be bartered away in such manner as to disable them from the performance of their public functions." *Id.* at 100. In other words, "[w]hen authority to exercise the police power within a defined sphere is delegated by the state to a municipal or other public corporation, the authority is inalienable in the corporation, and it cannot in any manner be contracted away or otherwise granted, delegated, diminished, divided, or limited by the corporation." 6A E. McQuillan, *Municipal Corporations* § 24.41, at 116-17 (3d ed. rev. 1988).

Such authority is in the nature of a public trust conferred upon the legislative body of the corporation for the public benefit, and it cannot be exercised by others. *Arkansas-Missouri Power Co.* v. *City of Kennett*, 78 F.2d 911, 920 (8th Cir. 1935). Therefore, if a public corporation enters into a contract that barters away or otherwise restricts the exercise of its legislative or police powers, then the contract is ultra vires and void ab initio. *Byrd* v. *Martin, Hopkins, Lemon and Carter, P.C.*, 564 F. Supp. 1425, 1428 (W.D. Va. 1983), aff'd, 740 F.2d 961 (4th Cir. 1984); see also *Arkansas-Missouri Power Co.*, 78 F.2d at 922 ("any contract whereby legislative authority or duty is attempted to be delegated by a city is absolutely null and void.") and 6A E. McQuillan, *Municipal Corporations*, at 117 ("contracts . . . which embarrass in any degree the municipal power of regulation of public affairs are ultra vires").

In executing the agreements at issue here, the Vermont municipalities violated the non-delegation doctrine in at least two ways.[2] First, each of the participants attempted to re-delegate one of the most fundamental of its legislative powers: the spending power. Second, the municipalities' agreements regarding other liens on their revenues impermissibly restricted the future exercise of discretion and judgment by their legislative bodies.

"[U]nits of local government cannot by contract or otherwise barter away or surrender their essential legislative or police

[2] The superior court treated this argument summarily, opining that "in view of 30 V.S.A. § 4002(5) this court concludes that there has been no improper delegation of utility management responsibility as a result of the PSAs." Subsection 4002(5) provides only that municipalities and cooperatives have "authority to otherwise do all lawful acts and things necessary or incidental to the exercise of the authority granted in this chapter." The superior court's citation of this provision begs the question of whether the delegations under the PSAs were lawful. Moreover, if such standard, statutory clauses were held to constitute legislative permission, then the "deep-rooted" non-delegation principle would be effectively extirpated from our jurisprudence.

powers, . . . ." *Byrd,* 564 F. Supp. at 1428; see also *Northwest Natural Gas Co.* v. *City of Portland,* 300 Or. 291, , 711 P.2d 119, 128 (1985) (municipality's power to act for the public's general welfare cannot be bargained away to a public utility). Here, each Vermont participant was presented with an opportunity to obtain — without capital investment — exclusive rights to a percentage of potentially available, inexpensive, electrical energy. But, as part of the substantial consideration required for this bargain, the participants bartered away the ability to exercise judgment and discretion regarding energy costs. "Where the exercise of judgment and discretion and the power to burden the public treasury have been so vested [in the municipality] by the Legislature, they may not be delegated wholesale." *Syrtel Buildings, Inc.* v. *City of Syracuse,* 78 Misc. 2d 780, 358 N.Y.S.2d 627, 630 (N.Y. Sup. 1974).

The express component of the municipalities' attempted delegation of spending authority is found in paragraph 3(a) of the uniform PSAs, which provides that:

> MMWEC, in good faith and in accordance with Prudent Utility Practice, shall . . . use its best efforts: (i) to arrange for the financing, planning, engineering, design, acquisition, construction, operation and maintenance of the Project; . . . and (iii) to issue and sell Bonds to finance the Costs of Acquisition and Construction of the Project, and to finance the costs of any necessary renewals, extraordinary repairs, replacements, modifications, additions and betterments for the Project. . . .

The purported delegation was made complete by the participants' failure to retain any vestige of control over decisions to incur debt. Under the provisions of the PSAs and the Bond

Resolution, MMWEC has the sole power to establish budgets, revise those budgets, and fix the amount of the participants' monthly payments. Further, the authority to issue bonds resides in MMWEC alone, whether the bonds be for the costs of plant construction, operation, termination, or of "renewals, extraordinary repairs, replacements, modifications, additions and betterments. . . ." In sum, MMWEC makes all decisions to incur, or to refrain from incurring, project debt. Hence, MMWEC is given exclusive control over the magnitude of the participants' monthly payments and over the duration of these payments.

Defendants argue, in effect, that the attempted contractual delegation is permissible because MMWEC has substantial obligations to each of the participants under the PSAs. They note that MMWEC's duties to the Vermont participants are no different than its duties to Massachusetts participants and that MMWEC is obligated to act in accordance with prudent utility practice. This reasoning is flawed because no degree of contractual consideration — even an agreement to assume substantial obligations — can render a municipality's abdication of legislative power permissible. We also note that the Massachusetts participants have elected representatives on MMWEC's board of directors, while the Vermont participants retain no voice whatsoever in the management of the project.

The parameters of permissible redelegation by public corporations can be illustrated by contrasting two cases. In *Arkansas-Missouri Power Co.* v. *City of Kennett,* 78 F.2d 911 (8th Cir. 1935), the Eighth Circuit considered the legality of a municipality's loan agreement with the federal government that would enable the city to construct an electric power plant. Under the terms of the agreement, the federal government obtained a large amount of discretion and control over plans for the plant, labor contracts, and the use of materials. The court stated that:

> The building of an electric light plant obviously requires the exercise of judgment and discretion. . . . The duty to exercise that judgment is imposed upon the council of the city. We think that it may not contract that duty away or share it with others. That does not mean that it may not have plans and specifications prepared by architects and engineers, or that, when such plans have been finally approved by it, it may not let a general contract for the doing of the work and the furnishing of the materials. It does mean that in selling its bonds or otherwise financing the project, it may not delegate to the person who furnishes the money any substantial discretion with respect to the selection of labor or material to be furnished or share with that person the authority to direct and control the construction.

*Id.* at 922.

Because the federal government had retained "sufficient control . . . to insure that the money furnished would be spent in the way that the government thought it should be spent, whether that was in accord with the ideas of the city council or not," the court held that the city had impermissibly delegated its authority to build the plant. *Id.* at 923.

By way of contrast, the Supreme Court of Washington found no unlawful delegation of legislative or discretionary functions in *Roehl* v. *Public Utility Dist. No. 1*, 43 Wash. 2d 214, , 261 P.2d 92, 105 (1953). There, a consortium of five public utility districts employed an independent consulting engineer to assist them in operating a joint power supply system. In the course of dismissing an argument that the district commissioners had unlawfully delegated their powers, the court noted that the engineer was given no authority to make policy decisions of a legislative character and that he was not free to ignore the

basic policies formulated by the commissioners. Instead, the engineer was to act as a consultant, prepare budgets, perform inventories and valuations, and act as an impartial fact-finder as between the individual districts. Although these duties required the exercise of judgment, the court concluded that they were administrative in character and that no violation of the non-delegation principle had occurred. *Id.* at 106.

The case at hand is closer to *Arkansas-Missouri Power* than it is to *Roehl*. As in the construction of a generating plant, arrangements aimed at ensuring long-term supplies of power require the ongoing exercise of legislative judgment and discretion. This is especially true where, as here, it is contemplated that the attempted arrangements may fail but where long-term financial obligations will be incurred nonetheless. The duty to exercise that judgment and discretion lies with the legislative bodies of the municipalities, and they cannot legally contract this duty away. The authority to spend the municipalities' revenues and the power to limit those expenditures must always be available for use in order that present and future needs may be met. See *Ericksen* v. *City of Sioux Falls*, 14 N.W.2d 89, 95 (S.D. 1944); 6A E. McQuillan, *Municipal Corporations*, at 117.

The participants also violated the non-delegation doctrine by agreeing to restrictions upon their power to make expenditures with regard to other projects or purchases. Paragraph 5(f) of the PSAs provides that:

> The Participant shall not issue bonds, notes or other evidences of indebtedness payable from and secured by a lien on the revenues derived from the ownership or operation of its electric system without providing for the payment of operating expenses (including Monthly Power Costs hereunder) from such revenues ahead of debt service on such bonds, notes or other

> evidences of indebtedness unless an independent consulting engineer . . . certifies that the facilities, for the financing of which the bonds, notes or other evidences of indebtedness are being issued, are . . . reasonably expected to properly and advantageously contribute to the conduct of the business of the electric system of the Participant in an efficient and economical manner consistent with prudent management.

Under an important corollary to the non-delegation principle, a public corporation may not enter into a contract that purports to restrict the future exercise of its legislative authority. See *Byrd,* 564 F. Supp. at 1428-29; *Illinois Power & Light Corp.*, 11 F. Supp. 874, 885 (E.D. Ill. 1935), rev'd on other grds., 89 F.2d 985 (7th Cir. 1937); *Barton* v. *Atkinson,* 228 Ga. 733, 744, 187 S.E.2d 835, 843 (1972); and *City of Louisville* v. *Fiscal Court of Jefferson County,* 623 S.W.2d 219, 224 (Ky. 1981); cf. *Pierce Oil Corp.* v. *City of Hope,* 248 U.S. 498, 501 (1919) (where public welfare is involved, a contract not to legislate would have no effect). By agreeing to the contractual provisions above, the participants have fettered the future exercise of the authority granted to them under the provisions of 24 V.S.A. § 1822 and other municipal utility financing statutes. In the not-unlikely event that a participant should wish to commit a portion of its revenues to acquire energy supplies or facilities in the future, it would have to either: (1) give priority to the monthly payment to MMWEC, or (2) obtain the certification of an independent engineering consultant regarding the advisability of the acquisition. The first option would hinder any prospective financial arrangement because of MMWEC's priority, and either option would deny the free exercise of legislative discretion.

The assignment of proprietary functions, such as plant operation, to MMWEC may be permissible, but the effective

transfer of the municipalities' spending power and the restrictions upon their ability to incur other debts constitute impermissible attempts to redelegate legislative authority.[3] Therefore, the municipalities' execution of the PSAs was ultra vires, and these contracts were void ab initio.

B.

We next consider the enforceability of the PSAs executed by the electric cooperatives, VEC and WEC. The non-delegation principle outlined in the foregoing discussion applies to municipalities and "other public corporation[s]." 6A E. McQuillan, *Municipal Corporations*, at ¦16. Although electric cooperatives are not public corporations in the technical sense of that term, we hold that their agreements with MMWEC are void nonetheless.

"[S]trictly speaking, a public corporation is one that is created for political purposes with political powers to be exercised for purposes connected with the public good in the administration of civil government." 1 *Fletcher Cyclopedia of Corporations*, § 58, at 579 (Rev. ed. 1983). In contrast, "quasi-public corporations" are private corporations to which the state has granted a secondary franchise involving the performance of public duties. *Id.* § 63, at 600. Investor-owned public service corporations organized for profit, including gas and light companies, are deemed to be quasi-public corporations. *Id.* at 602.

[3] We note that 30 V.S.A. § 605 authorizes the Village of Lyndonville to enter into utility contracts containing provisions for "arbitration, delegation and other matters deemed necessary or desirable to carry out their purposes." This language cannot be characterized as legislative permission to delegate the spending power, however, even assuming that such permission would be effective. It appears to refer only to delegation of tasks to third parties. Legislative permission to re-delegate granted authority must be specific: "'"'A legislative power granted to a municipal corporation cannot be parted with unless such was the clear intent of the legislature, . . . . The authority to surrender the power must appear from "the clear letter of the law."'" *Arkansas-Missouri Power Co.*, 78 F.2d at 921 (quoting *National Water Works Co. of New York v. Kansas City*, 20 Mo. App. 237, 242, S.W. , (1886)).

The corporate structures of VEC and WEC comport with neither of the above definitions and fall somewhere between the classifications "public" and "quasi-public." These cooperatives were not created under the Vermont Business Corporation Act; instead, they were organized pursuant to Chapter 81 of Title 30, under which the power to provide electrical energy is the primary franchise granted by the state. They are non-profit, non-stock corporations created for a single, governmental purpose: the provision of electrical energy to rural areas. Significantly, Chapter 81 and its statutory predecessors allowed cooperatives to adopt a role formerly held by a state agency, known as the Board of Rural Electrification, which had similar powers. See An Act to Promote Rural Electrification, No. 116, 1943 Vt. Laws 161.

The cooperatives' membership requirement distinguishes them from purely public corporations, but this characteristic is simply an organizational device made necessary by the lack of a municipal structure. "It is contemplated in both [municipal corporations and cooperatives] that all the inhabitants in the described territory shall be eligible to obtain the service by complying with the reasonable conditions." *Bookhart* v. *Central Electric Power Cooperative,* 65 S.E.2d 781, 786 (S.C. 1951) (citing *State ex. rel. Wood* v. *Consumers' Gas Trust Co.,* 157 Ind. 345, 352, 61 N.E. 674, (1901). Here, although VEC and WEC provide electricity to members only, their by-laws provide that "any person" may become a member, and, in effect, such membership depends only upon an agreement to purchase electricity from the cooperative.

The courts have disagreed on the extent to which electric cooperatives can be characterized as public or governmental in nature. Cf. *Bookhart,* 65 S.E.2d at 786 (legislature plainly intended to make electric cooperatives public corporations rather than private) with *City of Paris* v. *Federal Power Commission,* 399 F.2d 983, 986 (D.C. Cir. 1968) (electric coopera-

tives not governmental instrumentalities). Even on the question of whether such cooperatives are public utilities, there is a split in authority: most cases on that question are concerned with the jurisdiction of the respective state regulatory commissions, see, e.g., *Garkane Power Co., Inc.* v. *Public Service Commission*, 98 Utah 466, 100 P.2d 571 (1940), or the power of eminent domain, see, e.g., *Dairyland Power Cooperative* v. *Brennan*, 248 Minn. 556, 82 N.W.2d 56 (1957). Those questions are not before us here, but we observe that VEC and WEC are subject to supervision and regulation by the Public Service Board, 30 V.S.A. § 2(a)(12), and that both have the power of eminent domain, *id.* at § 3002(15). We note that the contracting powers of public utilities are constrained by state authority: "A public utility has the right to enter into a private contract but the state can modify that contract when it falls outside the parameters of an appropriate standard." *Afton Energy, Inc.* v. *Idaho Power Company*, 111 Idaho 925, 929, 729 P.2d 400, 404 (1986).

It is at least arguable that the non-delegation doctrine prohibits even quasi-public corporations from re-delegating powers granted to them in connection with their secondary, public service franchises. One court has applied the non-delegation doctrine in a case involving several public utility districts — which are analogous to cooperatives in many respects — after designating them as quasi-municipal corporations. See *Roehl*, 43 Wash. 2d at , 261 P.2d at 105-06; see also *Conley* v. *Union County Peoples' Utility Dist.*, 182 Or. 565, 187 P.2d 150 (1947) (invoking non-delegation principle to invalidate agreement between public utility district and electric cooperative).

We need not debate this question further, however, nor resolve the underlying definitional problem, because even private corporations have certain limitations upon their power to delegate authority. The state grants corporate power to private

entities upon the assumption that the powers will be exercised by the corporation's elected officers and not by the officers of another corporation. *Sherman & Ellis* v. *Indiana Mutual Casualty Co.*, 41 F.2d 588, 591 (7th Cir. 1930). Under the well-settled rule, " '[c]ontracts are ordinarily void . . . which have the effect of withdrawing from the directors the control and direction of corporate affairs, business and management, which is vested in them by law . . . and an agreement by which the . . . directors . . . abdicate or bargain away in advance the judgment which the law contemplates they shall exercise over the affairs of the corporation is void.' " *Milton Frank Allen Publications, Inc.* v. *Georgia Assoc. of Petroleum Retailers, Inc.*, 224 Ga. 518, 528, 162 S.E.2d 724, 730 (1968).

Although this precept echoes, to a degree, the elements of the non-delegation principle, it is not based upon considerations of sovereignty. Instead, the rule springs from the fiduciary relationship between the corporate directors and the shareholders: "Directors of a corporation are regarded as fiduciaries and are required to exercise their own independent judgment for the highest welfare of the corporation and its stockholders." *Stoneham* v. *Fox Film Corp.*, 295 Mass. 419, 425, 4 N.E.2d 63, 66 (1936). It is true that the courts have been flexible in allowing delegation of authority by boards of directors where necessary or expedient. *Boston Athletic Ass'n* v. *International Marathons, Inc.*, 392 Mass. 356, 365, 467 N.E.2d 58, 63 (1984). Yet, at a minimum, there are certain powers and duties that cannot be delegated indefinitely to outsiders. *Sherman & Ellis*, 41 F.2d at 590.

With respect to electric cooperatives, we believe that one of these inalienable powers is the spending authority. Too broad a delegation of power, either express or implied, becomes an unlawful abdication of management functions by the board of directors. *Fournier* v. *Fournier*, 479 A.2d 708, 712 (R.I. 1984). In the instant case, the attempted transfer of essen-

tially unlimited spending authority would have accomplished this degree of delegation. 30 V.S.A. § 3013 dictates that "[t]he business of a cooperative shall be managed by a board of not less than five trustees. . . ." But, when VEC and WEC executed the PSAs, they effectively transferred to MMWEC the unlimited power to determine a substantial portion of their monthly costs for a protracted and interminable period of time. Moreover, the cooperatives also agreed to restrictions upon their future power to issue bonds, and other evidences of indebtedness, secured by liens on their revenues. Because these agreements would have operated to restrict the freedom of the trustees to manage corporate affairs, they are illegal and void. See *Triggs* v. *Triggs*, 46 N.Y.2d 305, 309, 385 N.E.2d 1254, 1255 (1978). We hold that, whether VEC and WEC are treated as public or private corporations, the execution of the PSAs at issue here was beyond their powers.

III.

Our resolution of this appeal on delegation grounds renders consideration of plaintiffs' arguments regarding municipal and cooperative indebtedness unnecessary. Woven through the contentions of defendants and amicus, however, is a recurring theme that requires some comment. Defendants and the Vermont League of Cities and Towns urge that the practical and legal consequences of a decision voiding the PSAs should be considered by this Court. First, defendants maintain that the Supreme Court of Washington's decision in *Chemical Bank*, 666 P.2d at 335, voiding similar contracts between utilities and WPPSS, has created serious doubts about municipal borrowing authority, generated frequent test cases, and produced bizarre rulings by the lower courts. Second, defendants point out that the Washington municipalities that were released from the WPPSS contracts are now defending massive securities

fraud lawsuits. We are no more influenced by these considerations that we are by plaintiffs' emphasis on the immensity of the financial burden imposed by the agreements or by the fact that no power has yet been produced — and may never be produced — by the project. Our Courts are courts of law and will deal with the legal ramifications resulting from our holding; policy considerations are for the legislature.

IV.

Finally, defendants point out that they raised the affirmative defenses of estoppel, res judicata, and fundamental fairness in the court below and that these issues were not ruled upon as part of the summary judgment. Hence, they maintain, this Court should remand the case to the superior court for further proceedings. Our holding that the PSAs are ultra vires and void ab initio obviates any such necessity.

Contracts that are ultra vires "are wholly void and not merely voidable; . . . the corporation is under a perpetual disability to make them . . . cannot be estopped from making the defense of ultra vires. . . ." *Metropolitan Stock Exchange* v. *Lyndonville National Bank*, 76 Vt. 303, 308, 57 A. 101, (1904); see also *California Pacific Bank* v. *Small Business Administration*, 557 F.2d 218, 223 (9th Cir. 1977) (party cannot be estopped from raising defense of illegality in a contract action, and the court is duty bound to raise the issue sua sponte). "'The non-enforcement of illegal contracts is a matter of common public interest, and a party to such contract cannot waive his right to set up the defense of illegality in an action thereon by the other party . . . . Validity cannot be given to an illegal contract through any principle of estoppel.'" *Sherwood & Roberts-Yakima, Inc.* v. *Leach*, 67 Wash. 2d 630, , 409 P.2d 160, 165 (1965) (quoting *Reed* v. *Johnson*, 27 Wash. 42, 55, 67 P. 381, 386 (1901)). We believe that this is equally

true of arguments regarding the kindred doctrine of res judiciata. This doctrine is not derived from statutory or common law; it is merely a "judicial reflection of public policy favoring one fair trial *on the merits* . . . as an expedient in the administration of public justice." *In re Skyline Lumber Co., Inc.* 311 F. Supp. 112, 115 (W.D. Va. 1970) (emphasis in original). The PSAs at issue here were void ab initio, and the invocation of judicial or equitable doctrines cannot now breathe life into them.

*The superior court's grant of defendants' motions for summary judgment is reversed and judgment for plaintiffs is entered.*

FOR THE COURT:

/s/ _____
Federic W. Allen
Chief Justice

## APPENDIX B

IN THE SUPREME COURT
OF THE
STATE OF VERMONT

VERMONT DEPARTMENT OF PUBLIC SERVICE, VILLAGE OF STOWE; and VERMONT ELECTRIC COOPERATIVE, INC.,
Plaintiff-Appellants,

v.

MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY; VILLAGE OF LUDLOW; VILLAGE OF LYNDONVILLE; VILLAGE OF MORRISVILLE; and VILLAGE OF NORTHFIELD,
Defendant-Appellees.

SUPREME COURT
DOCKET NO. 86-555

### MOTION FOR REARGUMENT

Massachusetts Municipal Wholesale Electric Company ("MMWEC") moves pursuant to V.R.A.P. 40 for reargument to address issues that were either misapprehended or overlooked entirely in the Court's opinion entered September 27, 1988. As grounds for this motion MMWEC states that the issues involved in this case are vitally important to all municipalities and public and private corporations in Vermont, as well as to MMWEC; that the ramifications of the Court's decision are far reaching and potentially calamitous; and that,

in failing adequately to address both the legal issues in the case and the practical implications of its decision, the Court has created uncertainty as to the law of Vermont and as to the validity of many existing contracts involving Vermont entities. The Court overlooked or misapprehended the following points of law presented in the original briefs, each of which would affect the result reached by the Court (and each of which is developed in more detail in the memorandum filed herewith):

1. Under 30 V.S.A. § 4002 municipalities and cooperatives are expressly authorized to purchase not just "energy," which is the actual output of an electric plant, but also "capacity," the plant's electric generating potential. The Court's opinion fails to give any weight whatsoever to the statutory authorization to purchase "capacity," or to recognize that what § 4002 authorizes is *precisely* what the PSA's provide, *i.e.*, the purchase of "capacity and energy."

2. The Washington Supreme Court opinion, *Chemical Bank* v. *Washington Public Power Supply System*, 99 Wash. 2d 772, 666 P.2d 329 (1983) aff'd en banc 102 Wash. 2d 874, 691 P.2d 524 (1984), *cert. denied*, 105 S. Ct. (1985), and the Supreme Court of Idaho opinion, *Asson* v. *City of Burley*, 109 Idaho 432, 670 P.2d 839 (1983), were based on state statutes which did not expressly authorize contracts for capacity, unlike 30 V.S.A. § 4002.

3. If there is *any* statutory authority for the municipalities and cooperatives to enter into PSAs then, by definition, the utilities have permissibly delegated their authority. Inexplicably, the Court refused to consider several of the statutory provisions that empower the Vermont participants to enter into the PSAs. Because there is statutory authority, the non-delegation doctrine is inapplicable.

4. The Court cited Lyndonville's express authority under 30 V.S.A. § 604 to enter into take-or-pay contracts, but inexplicably failed to uphold Lyndonville's PSA. The Court does

not have the authority to ignore, or implicitly "repeal," explicit legislative enactments.

5. Sections 3(a) and 5(f) of the PSAs involve relatively minor delegations of municipal authority when compared to the delegations of municipal powers in the cases cited by the Court. The Court's decision gives no recognition to the broader scope of delegation permitted with respect to proprietary as opposed to governmental functions.

6. Although based almost entirely on precedent from other jurisdictions, the Court's discussion of the non-delegation doctrine is inconsistent with the clear trend in the case law around the country to give corporations more, not less, latitude in delegating authority to its agents.

7. The PSAs contain a severability provision whereby in the event that a provision is declared to be invalid the remainder of the PSA shall remain in full force and effect.

8. Invalidating the PSAs on the basis of Vermont law impermissibly burdens interstate commerce and violates the Takings Clause and the Due Process Clause of the United States Constitution.

For the foregoing reasons, MMWEC respectfully requests that the Court allow reargument. Because of the significance of this case to MMWEC, to the other parties and to Vermont municipalities and corporations generally, MMWEC respectfully requests that the Court grant a hearing and allow oral argument on this Motion for Argument.

Respectfully submitted,

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Dated: October 10, 1988

## APPENDIX C

ENTRY ORDER

SUPREME COURT DOCKET NO. 86-555
APRIL TERM, 1987

APPEALED FROM:
Washington Superior Court
Docket No. S412-85WnC

VERMONT DEPARTMENT OF
PUBLIC SERVICE

*v.*

MASSACHUSETTS MUNICIPAL
WHOLESALE ELECTRIC CO.,
et al.,

In the above entitled cause the Clerk will enter:

The motion for reargument filed by Massachusetts Municipal Wholesale Electric Co. (MMWEC) on October 11, 1988, fails to identify points of law or fact previously overlooked or misapprehended. The motion is denied.

FOR THE COURT:
Frederic W. Allen, Chief Justice
Concurring:

Louis P. Peck, Associate Justice
Albert W. Barney, Chief Justice (Ret.)
F. Ray Keyser, Associate Justice (Ret.)
Stephen B. Martin, Superior Judge, (Specially Assigned)

# APPENDIX D

STATE OF VERMONT
WASHINGTON COUNTY, SS.

| | |
|---|---|
| Vermont Department of Public Service, Plaintiff | |
| v. | Washington Superior Court |
| Massachusetts Municipal Wholesale Electric Co.; Village of Ludlow; Village of Lyndonville; Village of Morrisville; Village of Northfield; Vermont Electric Cooperative, Inc.; Washington Electric Cooperative, Inc., Defendants | Docket No.<br><br>COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF |

## INTRODUCTION

1. This action for declaratory and injunctive relief is brought by the Vermont Department of Public Service ("DPS") on behalf of the State of Vermont: on behalf of all present and potential ratepayers of the Villages of Ludlow, Lyndonville, Morrisville and Northfield; on behalf of all present and potential ratepayers of the Vermont Electric Cooperative, Inc. ("VEC") and of the Washington Electric Cooperative, Inc. ("WEC"); and, pursuant to the Department's authority to enforce all laws related to Vermont utilities. DPS seeks to have the Agreements known as the Project Six Power Sales Agreements ("PSAs", "Agreements") declared void, invalid, ineffective and unenforceable. A copy of the Agreements is attached to this Complaint as Exhibit A. The Department also seeks to

enjoin the six Vermont utility defendants from making payments under the terms of said Agreements to the defendant Massachusetts Municipal Wholesale Electric Company ("MMWEC"). DPS's claims arise under Titles 24 and 30 of the Vermont Statutes, under the United States and Vermont Constitutions, and under general contract law.

## PARTIES

2. The Vermont Department of Public Service is an agency of the State of Vermont charged with the execution and supervision of all laws relating to public service corporations; with representation of the public interest in related proceedings; with representation of ratepayers; and, is authorized to prosecute this lawsuit on behalf of the State of Vermont by, among other authorities, special appointment by the Vermont Attorney General.

3. Municipal electric and cooperative electric systems in Vermont are public service corporations subject to the supervision of the Department of Public Service.

4. The Villages of Ludlow, Lyndonville, Morrisville and Northfield ("defendant Villages") are municipalities within the State of Vermont duly organized and chartered by the Vermont Legislature. The defendant Villages operate municipal electric light departments.

5. The defendant VEC is a non-profit corporation organized pursuant to Vermont law to provide low-cost electric energy and related services to its members. It has its principal place of business at Johnson, Vermont.

6. The defendant WEC is a non-profit corporation organized pursuant to Vermont law to provide low-cost electric energy and related services to its members. It has its principal place of business at East Montpelier, Vermont.

7. The defendant MMWEC is a public corporation organized pursuant to Massachusetts law for the purpose of engaging in joint power planning on behalf of its municipal members.

## JURISDICTION

8. This court has jurisdiction over this matter and these parties pursuant to 4 V.S.A. § 113 and other statutes.

## THE AUTHORITY OF VERMONT UTILITIES

9. With the exception of the Village of Lyndonville and the City of Burlington, the powers of Vermont municipalities with regard to the purchase of electricity for their citizens are set out by statute at 30 V.S.A. §§ 2902, 4002, and 5013.

10. The Vermont statutes do not authorize Vermont municipalities other than the Village of Lyndonville and the City of Burlington to purchase project capability except from Burlington, Lyndonville or the Vermont Public Power Supply Authority.

11. In signing thue PSAs the defendant Villages of Ludlow, Morrisville and Northfield agreed to purchase project capability from MMWEC.

12. 24 V.S.A. § 1822 prohibits municipal utilities from pledging their future earnings or profits without prior voter approval.

13. Section 5(c) of the Power Sales Agreements constitutes a pledge of future earnings or profits to meet participants' obligations to MMWEC.

14. In signing the PSAs the defendant Villages pledged their future revenue to MMWEC to the extent of their obligations under the Agreement.

15. The defendant Villages never sought nor received prior voter approval for their pledges of future revenue to MMWEC.

16. MMWEC never obtained or arranged for obtaining for the defendant Villages the right to pledge the Villages' future revenue.

17. 30 V.S.A. § 3032 prohibits electric cooperatives from encumbering any portion of their property without prior membership approval.

18. The Bylaws of VEC prohibit VEC from encumbering any substantial portion of its property without the prior approval of two-thirds of its membership.

19. The Bylaws of WEC prohibit WEC from encumbering any substantial portion of its property without the prior approval of two-thirds of its membership.

20. Section 5(c) of the Power Sales Agreements constitutes an encumbrance on property.

21. In signing the PSAs VEC and WEC encumbered their property by pledging future revenue to MMWEC to the extent of their obligations under the Agreements.

22. VEC and WEC never sought nor received prior membership approval for this encumbrance of their property.

23. MMWEC never obtained or arranged for obtaining for VEC and WEC, the right to encumber their property.

24. 30 V.S.A. § 108 prohibits an electric cooperative from pledging its property or issuing evidence of its indebtedness without the consent of the Vermont Public Service Board.

25. Section 5(c) of the Power Sales Agreements constitutes a pledge of corporate property.

26. The Power Sales Agreements are themselves evidence of the indebtedness of the participants signing them.

27. In signing the PSAs VEC and WEC pledged their corporate property by pledging future revenue to the extent of their obligations to MMWEC under the Agreements.

28. In signing the PSAs VEC and WEC issued evidence of their indebtedness to MMWEC.

29. Neither VEC nor WEC ever sought or obtained the consent of the Public Service Board to their pledges of corporate property.

30. Neither VEC nor WEC ever sought or obtained the consent of the Public Service Board to their issuance of evidence of their indebtedness.

31. MMWEC never obtained or arranged for obtaining for VEC or WEC, the right to pledge their corporate property.

32. MMWEC never obtained or arranged for obtained for VEC or WEC, the right to issue evidence of their indebtedness.

33. The Vermont Public Service Board is charged by Vermont statutes with the responsibility for setting rates and charges for electricity and related services, subject to findings that such rates are just and reasonable.

34. Section 5(c) of the PSAs commits Project Six participants to collect rates and charges at least sufficient to pay their obligations to MMWEC under the terms of the Agreements.

35. In signing the PSAs, VEC, WEC, and the defendant Villages committed themselves to charging their residents a minimum rate sufficient to pay their obligations to MMWEC without regard to the justness or reasonableness of those rates.

36. Under the terms of the PSAs ratepayers are deprived of their statutory rights to fair and properly set rates and to their procedural right to contest the reasonableness of utility charges imposed on them.

37. Under the terms of the PSAs ratepayers may be unjustly deprived of their property through rates and charges levied without any benefit given in return.

38. Section 5(c) of the PSAs constitutes an agreement to tax ratepayers if necessary to meet participants' obligations to MMWEC under any eventuality.

39. Act 179, Section 7 of the 1900 Vermont Acts, a part of the Charter of the Village of Ludlow provides that rate charges for electric use may be collected in the same manner as any tax assessed by the Village.

40. Act No. 313, Section 21 of the 1910 Vermont Acts, a part of the Charter of the Village of Morrisville provides that rate charges for electric use may be collected in the same manner as any tax assessed by the Village.

## THE BACKGROUND OF THE AGREEMENTS

41. In 1971 the Public Service Company of New Hampshire (PSNH) decided to construct a two unit nuclear power plant at Seabrook, New Hampshire ("Seabrook"). In 1972 PSNH formally began to seek licensing approvals and engaged in detailed planning for Seabrook. The original cost projected for the two units was $973 million with completion target dates of November 1979 for unit 1 and November 1981 for unit 2. PSNH retained a 50% ownership interest in Seabrook and the remaining 50% was sold in shares to 15 other New England utilities.

42. In 1976 MMWEC purchased its first small .16 percent share of Seabrook. MMWEC acquired an additional 4.3% ownership interest in 1977, and an additional 1.4% ownership interest in 1978.

43. In late 1978, due to difficulties PSHN was having financing its 50% ownership interest, PSNH began soliciting offers from other Seabrook owners for purchase of a portion of PSNH's interest.

44. When MMWEC determines that an ownership interest in a given power plant, like Seabrook, is available, it contacts its members to determine whether there is an interest in having MMWEC purchase a share of the power plant in question. If its members indicate sufficient interest MMWEC takes steps to obtain an ownership interest in the power plant and creates a power planning and acquisition vehicle, termed a "Project," through which its members can participate in the purchase of a share of the power plant's potential.

45. On or about December 15, 1978, MMWEC submitted to PSNH a letter expressing interest in purchasing an additional ownership interest in Seabrook.

46. Due to the financial difficulties PSNH was having, in March of 1979 the New Hampshire Public Utilities Commission ("NHPUC") ordered PSNH to immediately reduce its ownership interest in Seabrook to 28%.

47. In May, 1979, the New Hampshire legislature passed a law prohibiting PSNH from including costs of construction work in progress in its rate base.

48. In the first half of 1979 MMWEC took steps to create a Project through which its members could participate in the purchase of an additional share in Seabrook.

## THE TERMS OF THE AGREEMENT

49. The mechanism used by MMWEC and its members to formalize the agreement to participate in a Project is the Power Sales Agreement. The Power Sales Agreement associated with a Project establishes the portion of that Project that has been purchased by each public power entity and sets out the obligations of each participating entity with respect to that Project.

50. A Power Sales Agreement obligates a Project participant to pay its pro-rata share of all expenses incurred by MMWEC in relation to the Project, including any principal and interest obligations incurred as a result of debt issued by MMWEC to support the Project. Each participant is expressly required by the terms of the Power Sales Agreement to fix electric rates sufficient to provide revenue to meet its obligations under the contract.

51. The Power Sales Agreement used by MMWEC and its participants to formalize their agreements relating to the purchase of a 6% interest in Seabrook in 1979 is known as the Project Six Power Sales Agreement.

52. Under the terms of the PSA, MMWEC agrees to sell and the participants agree to purchase their share of "project capability." PSA, Section 4.

53. As defined in the PSA, " 'project capability' means the amounts of electric capacity and energy, if any, the Project is capable of producing at any particular time (including times when the Project is not operable or operating or the operation thereof is suspended, interrupted, interfered with, reduce or curtailed, in each case in whole or in part for any reason whatsoever), . . . ." PSA, Section 1(q).

54. Under the terms of the PSA, a participants' share is the percentage of project capability set opposite the participants' name in Exhibit A attached to the PSA, with certain adjustments provided for. PSA, Section 1(n).

55. Under the terms of the PSA, a "Participant" is an entity specified in Exhibit A attached to the PSA which enters into a Power Sales Agreement. PSA, Section 1(m).

56. By its terms the PSA is effective upon execution and delivery of Agreements entered into by MMWEC and participants whose participant's shares total 100%.

57. Under the terms of the PSA, participants are not required to make payments to MMWEC except from revenues and other monies derived by them from their electric departments or systems. The Agreement further provides, however, that participants will collect revenues for electric power and other related services at least sufficient to provide revenues to meet their obligations to MMWEC under the Agreement, and to pay all other amounts payable from or constituting a charge and lien upon such revenue, including amounts sufficient to pay the principal of and interest on all bonds issued by the participant for electric purposes, regardless of whether any power is received. PSA, Section 5 (c).

58. The Project Six Power Sales Agreements are unconditional guarantees of payment on revenue bonds to be issued by

MMWEC, expressly secured by pledges of a participant's utility revenues.

59. Payments must be made to MMWEC under the terms of the PSAs whether or not the Project or any facility of it is undertaken, completed, operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the output of the Project or any facility of it for any reason whatsoever in whole or in part. PSA, Section 5(d).

60. Under the terms of the PSA, participants are prohibited from issuing bonds, notes or other evidence of indetedness payable from or secured by a lien on revenues derived from their electric systems without providing first for the payment of Project Six operating expenses — including monthly power costs — from such revenues except under certain conditions. PSA, Section 5(f).

61. Under the terms of the PSA, default in payment by any participant results in an automatic increase in every other participant's share, pro rata, for the term of the Agreement, up to an accumulated maximum of 25% of the participant's share prior to such increase. PSA, Section 12(d).

62. Under the terms of the PSA, MMWEC retains full ownership and control of the Project.

63. Under the terms of the PSA, MMWEC obligates itself to use its best efforts in accordance with prudent utility practice to arrange for the financing, planning, engineering, design, acquisition, construction, operation and maintenance of the Project. PSA, Section 3(a)(i).

64. Under the terms of the PSA, MMWEC obligates itself to use its best efforts in accordance with prudent utility practice to obtain, or arrange for obtaining, permits and other rights and regulatory approvals necessary for the financing, planning, engineering, design, acquisition, construction, operation and maintenance of the Project. PSA, Section 3(a)(ii).

65. Under the terms of the PSA, MMWEC obligages itself to operate and maintain the Project, or cause the Project to be operated and maintained, in accordance with prudent utility practice. PSA, Section 3(d).

66. Under the terms of the PSA, MMWEC obligates itself to operate and maintain the Project, or cause the Project to be operated and maintained, so as to meet the requirements of government agencies having jurisdiction. PSA, Section 3(d).

67. Under the terms of the PSA, MMWEC obligates itself, subject to the terms of its Joint Operating Agreement, to terminate either Seabrook facility when MMWEC determines that such facility is not capable of producing energy consistent with prudent utility practice. PSA, Section 10.

68. The PSA terminates by its terms when either (i) all of the facilities have been terminated as provided for in the PSA, (ii) the principal of and premium, if any, and interest on all of the bonds have been paid or funds set aside for the payment or retirement thereof in accordance with the bond resolution, and (iii) all other obligations and liabilities under the PSA have been paid or provided for. PSA, Section 2.

69. The PSAs are made under and governed by the law of the Commonwealth of Massachusetts. Section 19.

## VERMONT'S PARTICIPATION IN THE AGREEMENTS

70. From December, 1978 through September, 1979 MMWEC representatives solicited interest from Vermont utilities in purchasing Seabrook capability under the Power Sales Agreements.

71. From December, 1978 through September, 1979 MMWEC representatives deliberately solicited participation by Vermont utilities in Project Six.

72. From December, 1978 through September, 1979 MMWEC representatives deliberately solicited participation by Vermont utilities in Project Six.

73. From December, 1978 through September, 1979 MMWEC representatives repeatedly corresponded with representatives of Vermont utilities regarding the purchase and sale of shares of project capability in Project Six.

74. From December, 1978 through September, 1979 MMWEC representatives met personally with representatives of Vermont utilities to discuss the purchase and sale of shares of project capability in Project Six.

75. In May or June of 1979 MMWEC invited representatives of Vermont utilities to MMWEC's annual meeting for the purpose of discussing the purchase and sale of shares of project capability in Project Six.

76. Some representatives of Vermont utilities did attend the MMWEC annual meeting for the purpose of discussing the purchase and sale of shares of project capability in Project Six.

77. Pursuant to Vermont Public Service Board General Order 45, on or about May 22, 1979 VEC filed notice of its intent to purchase shares of project capability from MMWEC.

78. In late June of 1979, MMWEC advised other interested Vermont utilities to file notice of their intent to purchase Seabrook capability with the PSB pursuant to General Order 45.

79. By letter dated June 28, 1979, the Villages of Enosburg, Hardwick, Ludlow, Lyndonville, Morrisville, Northfield, Stowe and Swanton, and the Washington Electric Cooperative, Inc. informed the PSB of their intention to purchase Seabrook capability from MMWEC.

80. On or about September 12, 1979, VEC filed a copy of the Project Six Power Sales Agreement with the PSB pursuant to General Order 45.

81. On or about September 18, 1979, the Villages of Enosburg, Hardwick, Ludlow, Lyndonville, Morrisville, North-

field, Stowe and Swanton, and the Washington Electric Cooperative, Inc. filed a copy of the Project Six Power Sales Agreement with the PSB pursuant to General Order 45.

82. By letter dated September 21, 1979, the PSB advised the Villages of Enosburg, Hardwick, Ludlow, Lyndonville, Morrisville, Northfield, Stowe and Swanton and the Washington Electric Cooperative, Inc. that its period of review under General Order 45 had commenced on September 18, 1979 and that no binding commitments were to be made under the Agreements prior to the running of the 90 day review period.

83. By letter dated September 26, 1979, the Villages of Enosburg, Hardwick, Ludlow, Lyndonville, Morrisville, Northfield, Stowe and Swanton, and the Washington Electric Cooperative, Inc. advised the PSB that the Power Sales Agreements would in all probability be signed on September 27, 1979, but that in accordance with the Board's opinion expressed in a letter dated September 21, 1979, the Agreements would be held in escrow pending Board action until the review period had run.

84. On or about September 27, 1979, the Villages of Ludlow, Lyndonville, Morrisville, Northfield, Stowe and Swanton, and VEC and WEC, along with twenty-two MMWEC member utilities and three other New England utilities, signed Project Six Power Sales Agreements.

85. The PSA signed by VEC was held in escrow and not delivered until on or about November 26, 1979.

86. The PSAs signed by the Villages of Ludlow, Lyndonville, Morrisville, Northfield, Stowe and Swanton and by WEC were held in escrow and not deliverred until on or about December 18, 1979.

87. All of the utilities which signed PSAs on September 27, 1979 believed that the Vermont utilities had authority to enter into the Agreements.

88. All of the utilities which signed PSAs on September 27, 1979 believed that the Town of Groton, Massachusetts had authority to enter into a PSA.

89. All of the utilities which signed PSAs on September 27, 1979 believed that the Town of Hull, Massachusetts had authority to enter into a PSA.

90. All of the utilities which signed PSAs on September 27, 1979 believed that substantially total participation in Project Six was assured as set out in Exhibit A attached to the PSA.

91. As set out in Exhibit A attached to the PSAs the Vermont utilities were allotted in total a 13.5966 percent share of project capability as follows: Village of Ludlow, .7947; Village of Lyndonville, .8625; Village of Morrisville, 1.0350; Village of Northfield, .2875; Village of Stowe, 2.0125; Village of Swanton, 1.3018; Vermont Electric Cooperative, Inc., 5.7501; Washington Electric Cooperative, Inc., 1.5525.

92. By letter dated October 1, 1979 the Villages of Ludlow, Lyndonville, Morrisville, Northfield, Stowe and Swanton, and the Washington Electric Cooperative, Inc. filed with the PSB an execution copy of a PSA and a letter from MMWEC consenting to the holding of the PSAs in escrow for 90 days from September 18, 1979.

93. On or about October 5, 1979, MMWEC's Petition for Project Six financing approval was filed with the Massachusetts Department of Public Utilities ("MDPU") as Docket No. 20248. At the time the Petition was filed (for approval of $335 million in bonds) the total cost of Seabrook was estimated by PSNH to be $2.6 billion. Completion dates of April 1983 and February 1985 were anticipated for the two nuclear facilities.

94. On or about November 16, 1979, the State of Vermont, by and through its Attorney General, petitioned the PSB to conduct a public investigation into Seabrook, or, in the alternative, to condition its approval of the PSAs on endorsement by affirmative vote of affected municipal residents and coop-

erative members. As a basis for its Petition the State cited the magnitude of the costs involved, the fact that costs had risen substantially since the PSB had last investigated Seabrook, the possibility that the PSAs could obligate Vermont utilities to pay for energy projects which would only benefit Massachusetts, a lack of data, and the unwillingness of the involved Villages, VEC and WEC to respond to the State's request for information.

95. By letter dated November 27, 1979 the State of Vermont, by and through its Attorney General, advised the PSB of its opinion that it was the Board's duty in the case of the municipal Project Six participants to require a public vote on the PSAs.

96. On or about February 6, 1981, MDPU approved MMWEC's October 5, 1979 Project Six financing request.

97. During the sixteen month period it took to obtain MDPU approval of MMWEC's Project Six financing request, cost estimates for Seabrook rose to $3.12 billion.

98. The Vermont Villages of Stowe and Swanton, which signed PSAs on or about September 27, 1979, subsequently withdrew as Project Six Participants. Two MMWEC member utilities and one New Hampshire utility also withdrew. These withdrawals left twenty-eight participants in Project Six including six Vermont utilities that are defendants to this action.

99. When participation in Project Six was final the combined share of project capability allotted to Vermont utilities was 14.9282 percent, allocated as follows: Ludlow, 1.0013; Lyndonville, 1.0868; Morrisville, 3.2763; Northfield, .3623; Vermont Electric Cooperative, Inc., 7.2453; Washington Electric Cooperative, Inc., 1.9562. No new General Order 45 notice was submitted to the PSB to cover the utilities' June 1, 1981 contract to purchase this additional Seabrook power.

## THE STATUS OF THE SEABROOK PROJECT

100. In 1981-82, PSNH's continuing financial problems caused NHPUC to restrict funding for Seabrook 2.

101. In November of 1982, the estimated completion dates for Seabrook were extended to December 1984 for unit 1 and March 1987 for unit 2. Total cost estimates rose to $5.12 billion.

102. In 1983, MDPU denied MMWEC permission to issue additional long-term debt for Seabrook construction.

103. In 1984 the construction program for the Seabrook 2 facility was essentially abandoned.

104. By early 1985 some experts were predicting a completion date for Seabrook 1 as late as 1990, with an anticipated cost as high as $11.2 billion if Seabrook is ever completed. Any power produced by the Seabrook project will be several times more expensive than other alternatives now available.

105. Seabrook is not capable of producing energy at an economic price.

## MMWEC'S STATUS

106. In 1984 and 1985, MMWEC's bond ratings were reduced.

107. On April 4, 1985, the MDPU again denied MMWEC permission to issue additional bonds to finance further construction of Seabrook 1.

108. On April 11, 1985, Moody's suspended MMWEC's bond rating.

109. On April 12, 1985, Standard and Poor's put MMWEC on credit watch with negative implications.

110. Due to the high cost overruns in the Seabrook construction program and repeated extension of completion deadlines, MMWEC's ability to finance its ownership interest in Seabrook is in serious jeopardy.

111. MMWEC cannot continue to meet its payment obligations as a joint owner after December, 1985.

112. If MMWEC is unable to meet its construction payment obligations as a Seabrook joint owner, it will most likely forfeit its entitlements to Seabrook power.

113. MMWEC has an urgent, if not emergency, need for financial relief in order to prevent catastrophic impacts on its entire program.

## THE IMPACT OF PROJECT SIX ON VERMONT RATEPAYERS

114. MMWEC has taken no steps to terminate Seabrook or to seek its termination by agreement of the joint owners.

115. The cost of the Seabrook facility has become so great that payment of all obligations under the PSAs will cause severe long-term rate shock to ratepayers of the defendant Villages, VEC and WEC if Seabrook 1 is completed.

116. The rates which will be imposed on affected ratepayers will be beyond the means of many people to meet.

117. Rate shock will result in service curtailment for those persons who will no longer be able to afford electric service.

118. The effect of the Power Sales Agreements will be to curtail, and in some cases terminate, electric service to present ratepayers without providing those ratepayers with any right or means to contest the reasonableness of the rates imposed.

119. Payment of interest obligations to MMWEC by the Vermont utilities will cause severe financial hardship to those utilities.

## STATUS OF PAYMENT BY VERMONT PARTICIPANTS UNDER THE AGREEMENT

120. MMWEC intends to begin billing Project Six participants for their full share of interest on its Seabrook debt no later than January 1, 1986.

121. If MMWEC begins billing the Village of Ludlow on January 1, 1986 for Ludlow's share of interest on MMWEC's Project Six debt, Ludlow ratepayers' electric rates will immediately rise approximately 18.8 percent.

122. If MMWEC begins billing the Village of Lyndonville on January 1, 1986 for Lyndonville's share of interest on MMWEC's Project Six debt, Lyndonville ratepayer's electric rates will immediately rise approximately 12.2 percent.

123. If MMWEC begins billing the Village of Morrisville on January 1, 1986 for Morrisville's share of interest on MMWEC's Project Six debt, Morrisville ratepayers' electric rates will immediately rise approximately 46.8 percent.

124. If MMWEC begins billing the Village of Northfield on January 1, 1986 for Northfield's share of interest on MMWEC's Project Six debt, Northfield ratepayers' electric rates will immediately rise approximately 6.8 percent.

125. If MMWEC begins billing VEC on January 1, 1986 for VEC's share of interest on MMWEC's Project Six debt, member ratepayers' electric rates will immediately rise approximately 30.0 percent.

126. If MMWEC begins billing WEC on January 1, 1986 for WEC's share of interest on MMWEC's Project Six debt, member ratepayers' electric rates will immediately rise approximately 16.2 percent.

127. Effective June 1, 1985, the Villages of Lyndonville and Northfield have already filed rate increases that in fact collect from their ratepayers a portion of the amount they anticipate being billed for interest by MMWEC under the Agreements.

128. Effective September 1, 1985, the Village of Morrisville has already filed a rate increase that in fact collects from its ratepayers a portion of the amount it anticipates being billed for interest by MMWEC under the Agreements.

129. Defendant Village of Ludlow has represented that it will file a rate case in the near future which will include a portion of the amount it anticipates being billed for by MMWEC under the Agreement.

130. Defendants VEC and WEC have represented that they will borrow funds to pay MMWEC the amount they anticipate being billed for by MMWEC under the Agreements on January 1, 1986.

## CAUSES OF ACTION

### COUNT I

131. The powers of a municipality are only those specifically granted by the legislature. The charter of a municipal corporation is to be strictly construed against it. Every reasonable doubt as to a municipality's authority to act must be resolved adversely to it.

132. The Village of Ludlow, Morrisville and Northfield, at the time they entered into the Power Sales Agreements, were without statutory authority to contract with MMWEC for the purchase of project capability.

133. The Power Sales Agreements, having been entered into without authority by the Villages aforesaid, are *ultra vires*, void, invalid, ineffective and unenforceable.

### COUNT II

134. Twenty-four V.S.A. § 1822 prohibits municipal corporations operating public utilities from pledging utility earn-

ings or profits to secure payment for costs of operating or managing their utilities without prior voter approval.

135. The agreements of the Village of Ludlow, Lyndonville, Morrisville and Northfield, to make all payments due to MMWEC under the Power Sales Agreements from future fees and charges, constitutes precisely the type of pledges forbidden without voter approval.

136. The Villages' pledges of future revenue without voter approval, incorporated in Section 5(c) of the Power Sales Agreements, violate the statute and render the PSAs *ultra vires*, void, invalid, ineffective and unenforceable.

## COUNT III

137. 30 V.S.A. § 3032 prohibits VEC and WEC from encumbering all or any portion of their property without prior membership approval.

138. The agreements of VEC and WEC, to make all payments due to MMWEC under the Power Sales Agreements from future fees and charges, constitute precisely the type of encumbrance forbidden without membership approval.

139. VEC's and WEC's encumbrance of their property without membership approval, incorporated in Section 5(c) of the PSAs, violates the statute and renders the Agreements *ultra vires*, void, invalid, ineffective and unenforceable.

## COUNT IV

140. Article VIII of the Bylaws of VEC prohibits the Cooperative from encumbering all or any substantial portion of its property without prior membership approval.

141. Article IX of the Bylaws of WEC prohibits the Cooperative from encumbering all or any substantial portion of its property without prior membership approval.

142. The agreements of VEC and WEC, incorporated in Sections 5(d) and 12(d) of the Power Sales Agreements as unconditional pledges of future revenue are encumbrances on substantial portions of VEC's and WEC's property.

143. The agreements referred to at paragraph 142 above, having been made without membership approval, render the Power Sales Agreements *ultra vires*, void, invalid, ineffective and unenforceable.

## COUNT V

144. Thirty V.S.A. § 108 prohibits VEC and WEC from pledging corporate property or issuing evidence of their indebtedness without the consent of the Vermont Public Service Board after a finding by the Board that the proposed action will be consistent with the general good of the state.

145. The agreements of VEC and WEC, incorporated in Sections 5(c) and 12(d) of the PSAs as pledges of corporate property, being without Board approval, violate 30 V.S.A. § 108 and render the Agreements *ultra vires*, void, invalid, ineffective and unenforceable.

146. The agreements of VEC and WEC, incorporated in Sections 5(d) and 12(d) of the PSAs as unconditional obligations of indebtedness secured by the cooperatives' ability to charge rates for electric service, being without Board approval violate 30 V.S.A. § 108 and render the Agreements *ultra vires*, void, invalid, ineffective and unenforceable.

## COUNT VI

147. Thirty V.S.A. §§ 225-227 authorize the Vermont Public Service Board to set such rates for electric service as may appear just and reasonable after full review of rate proposals and the opportunity for public notice and hearing.

148. The agreements of the defendant Villages, VEC and WEC, to fix, revise and collect fees or charges for electric power sufficient to meet their obligations to MMWEC under the PSAs, constitute improper usurpations of the Vermont Public Service Board's ratemaking authority as established by statute.

149. The agreements of the defendant Villages, VEC and WEC, incorporated in Section 5(c) of the PSAs and described above, conflict with Vermont law and are therefore *ultra vires*, void, invalid, ineffective and unenforceable.

## COUNT VII

150. The Fifth and Fourteenth Amendments to the United States Constitution restrain governmental actions which deprive individuals of their property interests without due process of law.

151. The effect of the agreements of the defendant Villages, VEC and WEC, incorporated in Sections 5(c) and (d) of the Power Sales Agreements, is to deprive ratepayers of money to which they are entitled, of their statutory rights to just and reasonable rates, to their rights of prior approval as voters or as members of cooperatives, and to statutory and administrative procedural rights that would otherwise be followed in normal rate making proceedings.

152. The Power Sales Agreements as applied to Vermont ratepayers thus deprive them of procedural due process and are a taking without just compensation in derogation of the Fourteenth Amendment of the United States Constitution. As such the PSAs are *ultra vires*, void, invalid, ineffective and unenforceable.

## COUNT VIII

153. Chapter I, Articles 1, 2, 4 and 9 of the Vermont Constitution restrain actions which interfere with the right of Vermont citizens to be protected in the enjoyment of their property and to have recourse to the law when they are not.

154. The actions of VEC and WEC are such actions under the Vermont Constitution by virtue of the cooperatives' exclusive franchise to provide electric service to citizens residing in their service territory and the pervasive regulation of the manner in which they do so.

155. The effect of the agreements of the defendant Villages, VEC and WEC is to deprive ratepayers of money to which they are entitled, of their statutory rights to just and reasonable rates, to their rights of prior approval as voters or as members of the cooperatives, and to statutory and administrative procedural rights that would otherwise be followed in normal rate making proceedings.

156. The Power Sales Agreements as applied to Vermont ratepayers are thus deprivations of due process; takings without just compensation; and deprivals of remedies secured at law, all in derogation of the Vermont Constitution. As such the Power Sales Agreements are *ulta vires*, void, invalid, ineffective and unenforceable.

## COUNT IX

157. Chapter 1, Article 9 of the Vermont Constitution protects citizens from taxation for any purpose which is not more beneficial to the taxing community than would be the money raised, if not collected.

158. The agreement of the defendant Villages, incorporated in Section 5(d) of the Power Sales Agreements, constitutes a promise by the defendant Villages to impose a "rate" in the

nature of a surcharge or tax, if necessary, to meet their obligations to MMWEC under the PSAs.

159. Act No. 179, Section 7 of the 1900 Vt. Acts, a part of the Charter of the Village of Ludlow, provides that rate charges for electric use may be collected in the same manner as any tax assessed by the Village.

160. Act No. 313, Section 21 of the 1910 Vt. Acts, a part of the Charter of the Village of Morrisville, provides that rate charges for electric use may be collected in the same manner as any tax assessed by the Village.

161. The Power Sales Agreements provide for payments to MMWEC through rates which are in the nature of, and as to Ludlow and Morrisville may be collected as, a tax, whether or not the Project or any facility thereof is completed or operating or of any benefit whatsoever to the ratepayers and taxpayers of the defendant villages. The Agreements therefore violated Chapter I, Article 9 of the Vermont Constitution, which protects citizens from taxation for any purpose which is not more beneficial to the taxing community than would be the money raised if not collected.

## COUNT X

162. Pursuant to Section 19 of the Power Sales Agreements, any interpretation of those Agreements required to be made is governed by the law of the Commonwealth of Massachusetts.

163. Under Massachusetts law the doctrine of unconscionability, set out in principle in Article 2 of the Uniform Commercial Code, M.G.L.A. c. 106, § 2-302, is also applicable to contracts made in non-consumer commercial settings. *Zapatha* v. *Dairy Mart, Inc.*, 408 N.E.2d 1370 (1980).

164. The open-ended agreements of the Villages of Ludlow, Lyndonville, Morrisville and Northfield, and of VEC and

WEC, to pay their obligations to MMWEC under the Agreements whether or not the Project or any Facility thereof is undertaken, completed, operable or operating and whether or not MMWEC performs any of *its* obligations under the Agreements, constitute an unconscionable bargain on their face, and are in fact unconscionable.

165. The effect of the PSAs will be to impose substantially higher utility costs on thousands of Vermont citizens. The rate shock and service curtailment which are certain to result establish that the Agreements contravene public policy, are unconscionable, void, invalid, ineffective and unenforceable.

## COUNT XI

166. Section 2 of the Power Sales Agreements provides that the PSAs shall be effective upon their execution and delivery by MMWEC and participants whose participant's shares total 100 percent. A condition precedent to enforceability of the PSAs or to any entity incurring an obligation under them is thus that all participants who sign the PSAs be bound.

167. As set out in paragraphs 131-146, none of the defendant Villages, VEC and WEC, or the Towns of Groton, Massachusetts and Hull, Massachusetts, had valid authority to enter into the Power Sales Agreements.

168. The 100 percent participation condition precedent not having been fulfilled, no duty or obligation to perform under the Agreements arose in any of the participants. The Agreements are void, invalid, ineffective and unenforceable.

## COUNT XII

169. As set out at paragraphs 131-146, none of the defendant Villages, VEC or WEC, had proper authority to enter into the Power Sales Agreements.

170. At the time the PSAs were signed, all thirty-three signators were mutually mistaken as to the authority of the Vermont utilities to enter into the Agreements.

171. The basic assumption of authority to enter the PSAs having had a material effect on the agreed-upon exchange of performances and allocation of risk, the Agreements are void, invalid, ineffective and unenforceable.

## COUNT XIII

172. Section 2 of the Power Sales Agreements provides that the PSAs shall be effective upon their execution and delivery by MMWEC and Participants listed in Exhibit A whose participants' shares total 100.0 percent.

173. Based on representations by MMWEC that such 100.0 percent participation was substantially secured, and in reliance on those representations, thirty-three utilities signed the Power Sales Agreements.

174. On or before September 27, 1979, MMWEC knew or should have known that the authority of all of the Vermont participants was subject to question.

175. On or before September 27, 1979, knew or should have known that the authority of the Towns of Groton, Massachusetts and Hull, Massachusetts to enter the PSAs was under challenge.

176. The representations (both express and implied) of MMWEC to the Vermont utilities signing Power Sales Agreements that 100.0 percent participation was substantially secured, and MMWEC's failure to disclose the authority issues of which it had knowledge, was a material misrepresentation of fact going to the essential terms of the bargain.

177. MMWEC's material misrepresentation that 100.0 percent participation was substantially secured prevented a valid

contract from being formed. The apparent contract is void, invalid, ineffective and unenforceable.

178. MMWEC's material misrepresentation, which induced the parties to enter the PSAs, renders the Agreements void, invalid, ineffective and unenforceable.

179. On or before December 31, 1979, the contract deadline, MMWEC knew or should have known that it was the opinion of the Attorney General of the State of Vermont that the Villages of Ludlow, Lyndonville, Morrisville and Northfield lacked authority to enter into the Power Sales Agreements.

180. The assertions of MMWEC to the Massachusetts Department of Public Utilities, evidenced in its financing proceeding from October, 1979 through February, 1981, that substantially 100 percent participation in Project Six was secured, was a material misrepresentation of fact going to the essential terms of the bargain.

181. MMWEC's material misrepresentation, which induced the parties to remain Project participants, renders the PSAs void, invalid, ineffective and unenforceable.

## COUNT XIV

182. Pursuant to Sections 3(a) and (d) and 10(i)(B), of the PSAs, MMWEC owed a duty to the Project Six participants to use its best efforts in accordance with prudent utility practice in obtaining, or arranging for obtaining, the financing, planning, engineering, design, acquisition, construction, operation, maintenance and termination of the Project.

183. MMWEC failed to timely review the Vermont statutes and obtain, or arrange for obtaining, proper approvals and consents.

184. MMWEC failed to timely review the Massachusetts statutes and obtain or arrange for obtaining proper approvals.

185. MMWEC failed to change or attempt to change the manner in which the Seabrook construction program was being operated and maintained.

186. MMWEC has failed to terminate and continues to fail to terminate the Seabrook facility or to seek its termination by the joint owners.

WHEREFORE, the Department of Public Service requests that the court:

1. Declare the Project Six Power Sales Agreements void, invalid, ineffective and unenforceable as violative of Vermont statutes, of the United States and Vermont Constitutions, and of general contract law.
2. Enter a permanent injunction prohibiting the Villages of Ludlow, Lyndonville, Morrisville, and Northfield, and prohibiting VEC and WEC, from making payments to MMWEC under the Project Six Power Sales Agreements.

DATED at Montpelier, Vermont this 18th day of October, 1985.

STATE OF VERMONT
DEPARTMENT OF PUBLIC SERVICE

By: _____
Michael Marks
Director for Public Advocacy,

By: _____
Dinah Yessne
Special Counsel,

Attorneys for Plaintiff
Special Assistant Attorneys General
for the State of Vermont

## APPENDIX E

STATE OF VERMONT
WASHINGTON COUNTY, S.S.

| | | |
|---|---|---|
| VERMONT DEPARTMENT OF PUBLIC SERVICE, Plaintiff, | ) | Washington Superior Court |
| v. | ) | Civil Action |
| MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY, Defendant. | ) | Docket No. 5-412-85W |

ANSWER OF THE MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY.

The Massachusetts Municipal Wholesale Electric Company (MMWEC) answers Count I through Count IX, and Count XV through XVIII, of the Amended Complaint of the plaintiff, Vermont Department of Public Service (DPS), as follows:

FIRST DEFENSE

1. The allegations set forth in paragraph 1 of the Complaint constitute a statement of DPS' claims for which no response is required. To the extent these allegations constitute allegations of fact, the allegations are denied. MMWEC denies that Exhibit A to the Complaint is an accurate or true copy of the Project Six Power Sales Agreement (PSA).

. . .

6. The doctrines of conversion, constructive trust, and unjust enrichment, and tne remedy of damages, are inapplicable to MMWEC in the instant action.

EIGHTH DEFENSE

The Court lacks jurisdiction over the Plaintiff's Complaint under the doctrine of primary jurisdiction and exhaustion of administrative remedies.

NINTH DEFENSE

The conduct of the Vermont Department of Public Service, by prosecution of the present litigation and otherwise, constitutes state action within the meaning of the United States Constitution; and violates Article I, § 10, cl. 1 prohibiting the impairment of contracts.

TENTH DEFENSE

The conduct of the Vermont Department of Public Service, by prosecution of the present litigation and otherwise, constitutes state action within the meaning of the United States Constitution; and constitutes the deprivation of property of MMWEC without due process of law as guaranteed by the Fourteenth Amendment.

ELEVENTH DEFENSE

The conduct of the Vermont Department of Public Service, by prosecution of the present litigation and otherwise, exceeds

the police powers conferred upon the states by the Tenth Amendment to the United States Constitution.

TWELFTH DEFENSE

The conduct of the Vermont Department of Public Service, by prosecution of the present litigation and otherwise, burdens and discriminates against the Defendants' activities in interstate commerce in violation of the Commerce Clause of the United States Constitution, Article I, § 8, cl. 3.

THIRTEENTH DEFENSE

The conduct of the Vermont Department of Public Service by prosecution of the present litigation and otherwise, constitutes state action, and violates the privileges and immunities of the Defendant MMWEC as protected by the Fourteenth Amendment to the United States Constitution.

FOURTEENTH DEFENSE

The conduct of the Vermont Department of Public Service, by prosecution of the present litigation and otherwise, constitutes state action and denies equal protection of the laws to the Defendant MMWEC in violation of the Fourteenth Amendment to the United States Constitution.

MASSACHUSETTS MUNICIPAL
WHOLESALE ELECTRIC COMPANY

By its attorneys,

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Dated: May 1, 1986

## APPENDIX F

STATE OF VERMONT
WASHINGTON COUNTY, S.S.

| | | |
|---|---|---|
| Vermont Department of Public Service, in Its Own Capacity, and *ex rel.* the State of Vermont and the Ratepayers of the Vermont Utilities That Are Parties to This Case and The Village of Stowe and The Vermont Electric Cooperative, Inc. Plaintiffs v. Massachusetts Municipal Wholesale Electric Co.; Village of Ludlow; Village of Lyndonville; Village of Morrisville; Village of Northfield; Washington Electric Cooperative, Inc. Defendants | ) | Washington Superior Court<br>Civil Action<br>Docket No. S-412-85 WnC |

DEPARTMENT OF PUBLIC SERVICE
RENEWED
MOTION FOR SUMMARY JUDGMENT

NOW COMES the Plaintiff Vermont Department of Public Service, by and through its Director for Public Advocacy and Special Counsel, appearing also as Special Assistant Attorneys

General on behalf of the State of Vermont, and pursuant to the Stipulation of the parties and this Court's Order dated August 8, 1986 hereby renews its motion for summary judgment against each and all of the defendants under V.R.C.P. 56 on the specific grounds set forth in its memoranda in this matter. These grounds include the following bases for judgment:

1. Against the Villages of Ludlow, Morrisville and Northfield on the grounds that each was without statutory authority to contract with the Massachusetts Municipal Wholesale Electric Company ("MMWEC") for the purchase of project capability (Count I);
2. Against the Villages of Ludlow, Lyndonville, Morrisville and Northfield on the grounds that each redelegated its municipal power and authority to MMWEC in violation of Vermont law (Count XIX);
3. Against the Villages of Ludlow, Lyndonville, Morrisville and Northfield on the ground that each pledged to MMWEC earnings and profits to be derived from the operation of its utility system without first securing voter approval as required by 24 V.S.A. § 1822 (Count II);
4. Against the Villages of Ludlow, Lyndonville, Morrisville and Northfield on the ground that each incurred debt and issued evidence of its indebtedness to MMWEC without first securing voter approval as required by 24 V.S.A. § 1822 (Count II);
5. Against the Vermont Electric Cooperative, Inc. ("VEC") and the Washington Electric Cooperative, Inc. ("WEC") on the ground that each encumbered its property and incurred debt without membership approval as required by 30 V.S.A. § 3032 and each of their Bylaws (Counts III and IV);

6. Against VEC and WEC on the ground that each pledged its corporate property without the consent of the Vermont Public Service Board as required by 30 V.S.A. § 108 (Count V);
7. Against VEC and WEC on the ground that each issued evidence of its indebtedness to MMWEC without the consent of the Vermont Public Service Board as required by 30 V.S.A. § 108 (Count V);
8. Against each of the defendants on the ground that each usurped powers delegated to the Vermont Public Service Board to determine and set just and reasonable rates (Count VI);
9. Against each of the defendants on the ground that each violated the rights of ratepayers to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution (Count VII);
10. Against each of the defendants on the ground that each violated the rights of ratepayers to due process of law and other property rights under Chapter I, Articles 1, 2, 4 and 9 of the Vermont Constitution (Count VIII);
11. Against the Villages of Ludlow, Lyndonville, Morrisville and Northfield on the ground that each violated the right of its ratepayers not to be taxed for a non-beneficial purpose (Count IX);
12. Against each of the defendants on the ground that all conditions precedent to the validity of Project No. 6 Power Sales Agreements were not met (Count XI);

In support of this Motion, plaintiff relies upon the attached Affidavit and Memoranda of Law.

Dated at Montpelier, Vermont this 22nd day of September, 1986.

STATE OF VERMONT
DEPARTMENT OF PUBLIC SERVICE

By: /s/ _____
Michael Marks
Director for Public Advocacy

By: /s/ _____
Dinah Yessne
Special Counsel

Attorneys for Plaintiff

Special Assistant Attorneys General
for the State of Vermont

## APPENDIX G

STATE OF VERMONT

Washington, ss. Superior Court
Civil Action
No. S-412-85 WnC

Vermont Department of Public Service,
Plaintiff,
v.
Massachusetts Municipal Wholesale Electric Co. *et al.*,
Defendants.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56, Vt. R. Civ. P., the defendants Massachusetts Municipal Wholesale Electric Co., Washington Electric Cooperative and the Villages of Ludlow, Lyndonville, Morrisville and Northfield move for entry of summary judgment in their favor on the grounds that there is no issue as to any material fact and that they are entitled to judgment as a matter of law, all as set forth in defendants' briefs filed of even date herewith.

By their attorneys,

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Dated: September 22, 1986

## APPENDIX H

STATE OF VERMONT
WASHINGTON COUNTY, SS.

VERMONT DEPARMENT OF PUBLIC SERVICE, VILLAGE OF STOWE, AND VERMONT ELECTRIC COOPERATIVE, INC.

VS.

MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC CO.; VILLAGE OF LUDLOW; VILLAGE OF LYNDONVILLE; VILLAGE OF MORRISVILLE; VILLAGE OF NORTHFIELD; AND WASHINGTON ELECTRIC COOPERATIVE, INC.

WASHINGTON SUPERIOR COURT

DOCKET NO. S-412-85WnC

### JUDGMENT

This action is before the court on summary judgment motions filed by each party in accordance with the August 8, 1986 Stipulation of the parties. Those motions were filed by the parties as follows:

Vermont Electric Cooperative, Inc., on September 22, 1986;
Villages of Ludlow, Lyndonville, Morrisville, Northfield and Washington Electric Cooperative, Inc., on September 22, 1986.
Massachusetts Municipal Wholesale Electric Co., Washington Electric Cooperative, Inc., and the Villages of Lud-

low, Lyndonville, Morrisville, and Northfield on September 22, 1986.

Department of Public Service on September 22, 1986; and

Village of Stowe on September 23, 1986.

## FINDINGS OF FACT

1. On September 19, 1986, the parties filed a Stipulation of Facts. This was filed pursuant to Paragraph 6 of the August 8, 1986, Stipulation. This court finds as fact those facts so stipulated. A copy of the Stipulation of Facts is attached as an Appendix to this Judgment. Any reference herein to an exhibit means an exhibit stipulated to as part of the Stipulation filed September 19, 1986.

2. In 1979, the "Participants", twenty-two (22) Massachusetts municipal electrical utilities and six (6) Vermont utilities (parties to this litigation), entered into a set of Project No. 6 Power Sales Agreements (PSAs), with Massachusetts Municipal Wholesale Electric Company (MMWEC). Under these PSAs, MMWEC was to participate in the financing and construction of the Seabrook Nuclear Power Plant in Seabrook, New Hampshire, and the Participants by making payments to MMWEC became entitled to a fraction of the power generating potential (project capability) of Seabrook.

3. In this litigation, plaintiff raises the question of whether the Vermont participants could lawfully commit themselves to the terms of these PSAs.

4. Subsequent to the filing of the complaint, the Village of Stowe and the Vermont Electric Cooperative, Inc., without objection from any party and with court approval have been denominated as plaintiffs.

5. The PSA is set forth in full as Exhibit 42. Relevant provisions therefrom are as follows:

*1. Definitions.*

. . .

(q) "Project Capability" means the amounts of electric capacity and energy, if any, which the Project is capable of producing at any particular time (including times when the Project is not operable or operating or the operation thereof is suspended, interrupted, interfered with, reduced or curtailed, in each case in whole or in part for any reason whatsoever), less Project station use and losses, and shall be determined in accordance with the New England Power Pool Agreement, if any, and otherwise in accordance with Prudent Utility Practice.

. . .

*2. Term of Agreement.*

This Agreement shall be effective upon execution and delivery of Power Sales Agreements by MMWEC and Participants whose Participants' Shares total 100.0%. This Agreement shall terminate when (i) all of the Facilities have been terminated as provided in Section 10 of this Agreement, (ii) the principal of and premium, if any, and interest on all of the Bonds have been paid or funds set aside for the payment or retirement thereof in accordance with the Bond Resolution and (iii) all other obligations and liabilities hereunder have been paid or provided for.

*3. Financing, Design, Acquisition, Construction, Operation and Maintenance of the Project.*

(a) MMWEC, in good faith and in accordance with Prudent Utility Practice, shall, subject, however, in the case of any jointly owned Facility, to the provisions of the applicable ownership agreement between the owners

of the Facility, use its best efforts: (i) to arrange for the financing, planning, engineering, design, acquisition, construction, operation and maintenance of the Project; (ii) to obtain, or arrange for obtaining, permits and other rights and regulatory approvals necessary for the financing, planning, engineering, design, acquisition, construction, operation and maintenance of the Project; and (iii) to issue and sell Bonds to finance the Costs of Acquisition and Construction of the Project, and to finance the costs of any necessary renewals, extraordinary repairs, replacements, modifications, additions and betterments for the Project, not otherwise provided for, *provided*, that in each such case Bonds may then be legally issued and sold.

. . .

5. *Payments by the Participant; Sources of Such Payments.*

. . .

(c) The Participant shall not be required to make any payments to MMWEC under this Agreement except from the revenues and other moneys derived by the Participant from its electric department or system. The Participant covenants and agrees that it will fix, revise and collect fees or charges for electric power and energy and other services, facilities and commodities sold, furnished or supplied through its electric department or system at least sufficient to provide revenues adequate to meet its obligations under this Agreement and to pay any and all other amounts payable from or constituting a charge and lien upon such revenues, including amounts sufficient to pay the principal of and interest on all bonds issued by the Participant for electric purposes.

(d) The Participant shall make the payments to be made to MMWEC under this Agreement whether or not the Project or any Facility thereof is undertaken, completed,

operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the output of the Project or any Facility thereof for any reason whatsoever in whole or in part. Such payments shall not be subject to any reduction, whether by offset or otherwise, and shall not be conditioned upon the performance by MMWEC or any other Participant under this or any other agreement or instrument, the remedy for any nonperformance being limited to mandamus, specific performance or other legal or equitable remedy.

(e) The Participant shall not have the right to challenge any bill, invoice or statement rendered by MMWEC, invoke arbitration of the same or bring any court or administrative action of any kind questioning the propriety of the same after a period of twenty-four months from the date of rendering. In the case of a bill, invoice or statement containing estimates, the Participant shall not have the right to challenge its accuracy after a period of twenty-four months from the date of its adjustment to reflect the actual amounts due.

(f) The Participant shall not issue bonds, notes or other evidences of indebtedness payable from and secured by a lien on the revenues derived from the ownership or operation of its electric system without providing for the payment of operating expenses (including Monthly Power Costs hereunder) from such revenues ahead of debt service on such bonds, notes or other evidences of indebtedness unless . . .

*12. Obligations in the Event of Default.*

. . .

(d) Upon failure of any other Participant(s) to make any payment which failure constitutes a default under this Agreement, and except as transfers are made pursuant to paragraph (c), the Participant's Share shall be automatically

increased for the remaining term of this Agreement pro rata with that of the other non-defaulting Participant(s) and the defaulting Participant's(s') Share(s) shall be reduced correspondingly; *provided,* that no such reduction shall reduce the defaulting Participant's(s') obligations under paragraph (e); and further *provided,* that the sum of such increases for the Participant pursuant to this paragraph shall not exceed, without consent of the Participant, an accumulated maximum of 25% of the Participant's Share prior to any such increases.

. . .

*18. Arbitration.*

Any dispute under this Agreement shall be submitted to arbitration at the request of either MMWEC or the Participant. . . .

*19. Applicable Law.*

This Agreement is made under and shall be governed by the law of the Commonwealth of Massachusetts.

. . .

*20. Severability.*

If any section, paragraph, clause or provision of this Agreement shall be finally adjudicated by a court of competent jurisdiction to be invalid, the remainder of this Agreement shall be unaffected by such adjudication and all of the remaining provisions of this Agreement shall remain in full force and effect as though such section, paragraph, clause or provision or any part thereof so adjudicated to be invalid had not been included herein.

6. These PSAs are commonly referred to as "take-or-pay" contracts because they obligate the participants to make monthly payments on their pro rata shares of obligations under the PSAs whether or not they actually received electric energy. PSA paragraph 5(d) supra.

7. MMWEC's revenues consist primarily of payments to be made under PSAs for each project between MMWEC and the projects' participants. (Exhibit 7 at page 5.)

8. Under MMWEC's financing obligation it was to sell bonds consistent with the general bond resolution adopted August 26, 1976. (PSA paragraph 3(a)(iii); Exhibit 5.)

9. General Order No. 45 dated September 29, 1965, (Exhibit 34) requires that Vermont municipal and cooperative utilities give advance written notice of entering into any contract for the purchase of capacity in or energy from any electrical generating or transmission facility for ultimate consumption in Vermont. (Exhibit 34, Paragraph 1f).

10. The Vermont participants complied with General Order No. 45. (Stipulation, Paragraphs 35-44, 56).

11. The Public Service Board issued an Opinion dated September 29, 1965, in conjunction with General Order 45. (Exhibit 34). That Opinion stated in part:

. . .

> We find that the demand for electrical energy will be increasing rapidly in the State of Vermont in the foreseeable future. Consumption was 583,000,000 KWH in 1950. It increased to 745,000,000 KWH in 1955, 1,168,000,000 KWH in 1960, and 1,531,000,000 KWH in 1964. By 1975 it is reasonably estimated that consumption will increase to 2,900,000,000. The consumption in 1975 will be nearly quadruple the consumption of 1955.
>
> We find that the efficient and economical way to generate and transmit sufficient electrical energy to meet the increasing demand will be through the construction of large-scale facilities for generation and transmission. The technology of generation and transmission has been advancing rapidly in recent

> years. Generating units with a capacity of hundreds of thousands of kilowatts have become significantly more economical and efficient than units with a capacity in the tens of thousands. . . .

## CONCLUSIONS OF LAW

### Authority to Contract

Under 30 V.S.A. Section 4002, any cooperative or municipal electrical utility shall have

> . . .
>
> (2) Authority to act in participation with other such utilities in arranging for the purchase of supplies of capacity and energy from other utilities, either within or without the State of Vermont, including purchases from . . . public authorities;
>
> . . .
>
> (5) Authority to otherwise do all lawful acts and things necessary or incidental to the exercise of the authority granted in this chapter.

This statute was enacted in 1977 at a time when meeting future electrical power needs through economies of scale was recognized by electric utilities.[1]

Plaintiffs claim that this statutory provision is not enough to authorize the PSAs because under section 1q of the PSAs the participants may never receive any electric energy because of the "if any" provision in the definition of project capability. This argument was disposed of in *DeFazio* v. *WPPSS*, 679 P.2d 1316, 1338 (Or. 1984)

[1] For a background of New England electrical energy in the period leading up to the enactment of this statute, see the testimony in this action of Guy W. Nichols filed June 2, 1986.

> If a city may commit itself to a purchase at cost whatever a supplier using its best efforts can produce from facilities which will be financed in reliance on the city's contract, however small the production and however expensive the product turns out to be, then we see no reason why this authority stops at contracting to pay the cost if small and costly deliveries should turn out to be none at all.

There is nothing in section 4002(2) that requires the generating facility to be operational at the time of "arranging for the purchase of supplies of capacity and energy." It does not follow that since the PSAs anticipated a possibility that electric energy might not flow from the Seabrook facility, that that destroyed the authority of cooperatives and municipal electric utilities to enter into PSAs.

Plaintiffs claim that section 4002(2) does not authorize the PSAs because of 30 V.S.A. section 4006 which states:

> Notwithstanding any other provision of this chapter, nothing herein shall have the effect of, or be construed as altering, amending, or repealing the statutory purposes provided for by any statute enacted by the legislature of Vermont pertaining to the creation, establishment, or operation of municipal electric utilities or electric cooperatives.

Arranging for the purchase of supplies of capacity and energy, the very lifeblood of an electric utility, simply does not alter, amend or repeal any statutory purpose that this court is aware of pertaining to the creation, establishment, or operation of municipal electric utilities or cooperatives in Vermont.

Plaintiffs assert the enactment of 30 V.S.A. section 604 and section 5013(a) are inconsistent with the authority provided in

section 4002(2). Section 604 gives the City of Burlington and Village of Lyndonville express authority to enter into contracts like the PSAs "without regard to the operational status of a facility." Section 5013(a) which became effective in 1979 confers similar PSA type authorizations on member municipalities and cooperatives when contracting with Vermont Public Power Supply Authority (VPPSA). The Oregon Supreme Court rejected plaintiff's assertion in *DeFazio* v. *WPPSS*, 679 P.2d 1316, 1324 (Or. 1984).

> . . . [L]egislators alike would know that legal doubts alone could prove fatal to successful participation in any financing plan, however lawful it actually might be. It is perfectly sensible to meet such doubts by providing the desired statutory authority, whatever the prior authority might cover.

See also Note, *A Cry for Reform in Construing Washington Municipal Corporation Statutes*, 559 Wash. L. Rev. 653, 668, 670 (1984). Note, *Chemical Bank* v. *Washington Public Power Supply System; The Questionable Use of the Ultra Vires Doctrine to Invalidate Governmental Take-or-Pay Obligations*, 69 Cornell L. Rev. 1094, 1102 et seq. (1984).

Because of the court's conclusion that authority exists under 30 V.S.A., section 4002(2) for the cooperatives and municipal electric utilities to enter into the PSAs, it is unnecessary to embark upon a so-called Dillon's Rule analysis. (See *Valcour* v. *Village of Morrisville*, 104 Vt. 119, 129 (1932)).

Similarly in view of 30 V.S.A. 4003(5) this court concludes that there has been no improper delegation to utility management responsibility as a result of the PSAs.

Plaintiffs suggestion that MMWEC is a mere conduit is disposed of in *DeFazio, supra*, at page 1328 as follows:

> The commitment of an agency's long-term contract as security, even as the sole security, for financing a building, a power plant, or another source of supply dedicated to the agency's use does not turn WPPSS or any otherwise independent supplier into a "dummy corporation" of the contracting agency. WPPSS was used as the vehicle for building thermal generating projects for the participants precisely because it already had an independent existence and bonding capacity.

The next challenge by plaintiffs to the PSAs that the court will consider is whether there was non-compliance by the participant municipalities with 24 V.S.A. section 1822. Stripped to its bare essentials, that statute reads in part:

> A municipal corporation which may . . . operate . . . any public utility may also, by action of its legislative branch, . . . have the power . . . to provide for or to secure the payment for . . . operating . . . by pledging, assigning, or otherwise hypothecating . . . net earnings or profits . . . from the operation. . . .

Plaintiffs claim that the PSAs are invalid for want of voter approval under the remainder of section 1822 which states:

> . . . To that end the legislative branch of such municipal corporation shall have full power to authorize and direct the execution and issuance of contracts and evidences of indebtedness as may be necessary to carry out the provisions of this subchapter. Such contracts and evidences of indebtedness shall be in such form, shall contain such provisions and shall be

> executed as may be determined by the legislative branch. Nevertheless, no such indebtedness shall be incurred nor evidence thereof be issued nor shall such revenues be pledged, assigned or otherwise hypothecated by the legislative branch of any municipal corporation herein described unless and until at least a majority of the legal voters of such municipal corporation present and voting at a duly warned meeting, called for that purpose, shall have first voted to authorize the same.

The court concludes that the only kind of transaction under section 1822 that requires voter approval are those municipal utility payment obligations which are provided for or secured by an actual pledge, assignment, or hypothecation of net earnings or profits of the utility. Language in section 1822 following the first sentence relates back to pledge, assignment, or hypothecation transactions. For example, the beginning of the next sentence states "To that end." "That" refers to the end by which payments are provided for or secured by pledging, assigning, or otherwise hypothecating net earnings or profits. The third sentence of section 1822 starts "such contracts and evidence of indebtedness." The "such" refers to "contracts and evidence of indebtedness" in the second sentence of that action. As the court has stated, the second sentence operates, " to that end." The fourth sentence states, "nevertheless, no such indebtedness." "Such indebtedness" refers to that indebtedness in the second and third sentences of the section. Therefore, there is nothing in section 1822 that triggers that section unless there is a pledge, assignment, or hypothecation in fact.

In order to create a valid pledge, "the pledgee must take possession of the things pledged." *Coty* v. *Barnes* 20 Vt. 78, 81 (1847), *Island Pond Nat. Bank* v. *Lacroix* 104 Vt. 282, 295-296. Unde the PSAs, MMWEC simply does not have pos-

session of present or future ratepayer payments to the participants. Therefore, there has not been a pledge of such revenues.

In order to create a valid assignment, the assignor must deliver to the assignee, "full control of the fund beyond the reach of any contrary directions of the assignor." *Twin Valley Motors, Inc.* v. *John Morale*, 136 Vt. 115, 118 (1978). Under the PSAs, the participants earmark the source of payments due from them as being future revenues from their electric departments or systems. PSA paragraph 5(c) supra. An earmarking of the source falls well short of a deliverance of the participants of "full control" of such future revenues to MMWEC.

To hypothecate means to pledge property as security or collateral for a debt. Generally, there is no physical transfer of the pledged property to the lender; nor is the lender given title to the property; though he has the right to sell the pledged property upon default. Black's Law Dictionary, 5th Ed. 669; *Taylor* v. *Hudgins*, 42 Tex. 244, 247 (1875)

MMWEC certainly has the right to sell participant revenues upon default. The PSAs do not hypothecate revenues of participants so as to create either security or collateral for the benefit of MMWEC. With respect to the participants' revenues, MMWEC does not have either security or collateral different from that of a general creditor.

Therefore, with respect to Section 1822, that part of Section 5(c) of the PSAs which refers to "revenues and other monies derived . . . from its electric department or system" does not amount to a pledge, assignment, or other hypothecation by the participants. Furthermore, because the hypothecation clause of Section 1822 is not triggered by the PSAs, the court need not reach the "net earnings or profits" clause of that section. It simply notes in passing that the payments by participants in MMWEC under the PSAs are treated from an accounting standpoint as purchase power payments which are expenses allocable to gross revenues and not net earnings or profits. Stipulation of Facts, paragraphs 27 and 28, Exhibits 25-30.

This court will not lightly disregard an industry accounting practice or presume that a particular accounting technique was employed simply to get around a statutory section such as 1882 as plaintiffs may have suggested.

30 V.S.A. Section 3032 provides:

> A cooperative may not otherwise sell, mortgage, lease or otherwise dispose of or encumber all or a substantial portion of its property unless such sale, mortgage, lease or other disposition or encumbrance is authorized by the affirmative vote of not less than a majority of all the members of the cooperative. . . ."

The terms dispose of or encumber must be construed with reference to the prior terms. When an enumerated list in a statute is followed by a general term it must be construed to include only those terms which are similar in nature to the specific enumerated terms. *Langle* v. *Kurkle*, Vt. S. Ct., Docket No. 82-254 (Slip Op.) filed 1/24/86 at 2. "Sell, mortgage, lease" denote the granting of an interest in property. In the PSAs no interest in the revenues of the participants is given. The participants simply agree to raise sufficient revenues to pay their PSA obligations out of those revenues.

The Vermont participants have not guaranteed repayment of MMWEC issued bonds. PSAs represent an unsecured obligation to make payments in the future. Such obligations have been held not to constitute an encumbrance where no mortgage or lien is given and no specific asset is made available to satisfy the debt. *Jones* v. *Hawaiian Electric Co.*, 639 P.2d 1103 (Ha. 1982), (30-year lease puchase agreement not an encumbrance requiring commission's prior approval.)

30 V.S.A. Section 108(a) provides in part:

> A domestic corporation subject to the jurisdiction of the public service board shall not mortgage nor pledge

> any of its corporate property nor issue any stocks, bonds, notes or other evidences of indebtedness or change its shares as provided in section 270 of Title 11 without the consent of the public service board given on petition and after hearing of the corporation or its incorporators and a finding of the board that the proposed action will be consistent with the general good of the states. . . .

Insofar as section 108 prohibits a pledge or mortgage of corporate property without approval, this court's reasoning with respect to section 1822 and section 3032 is applicable. With respect to the prohibition of issuing stocks, bonds, notes or other evidence of indebtedness, the court concludes that these provisions do not encompass thue contractual obligations of the participants in the PSAs. *Jones* v. *Hawaii Electric Co.*, *supra*.

The PSA is entitled *Power Sales* Agreement. The first page of the PSA identifies the purpose of the PSA as simply for (1) MMWEC to obtain an ownership interest in the Seabrook project, (2) MMWEC to sell project capability and (3) participants to purchase project capability. As stated in finding 5, project capability is electric capacity and energy, if any.

These words, "if any," do not doom the transaction. They simply recognize that this massive financial and physical project called Seabrook not only might not succeed but also, and more important, would never even be undertaken unless the costs of the effort, whether successful or not, were provided for by those choosing to participate (the participants) in this risk. The PSA does not purport to be risk-free, nor does the Vermont authorizing statute (30 V.S.A. section 4002 (2)) require that it be so in arranging for the purchase of supplies of capacity and energy.

Section 108 also states . . . "But such corporation may issue evidences of indebtedness payable within one year from the

date of issue without such consent provided *such borrowing* is necessary . . ." The fact that the Vermont participants might have borrowed money to build generating facilities instead of entering into the PSAs does not somehow convert the PSA obligations into a borrowing or loan transaction.

## STEP-UP PROVISION

Plaintiffs claim that the so-called step-up provision of section 12(d) of the PSAs requiring a participant to assume a portion of a defaulting participant's obligation also violated 24 V.S.A. section 1822 and 30 V.S.A. section 3032.[2] In *DeFazio* v. *WWPPS, supra*, at page 1342 the court looked at a similar provision and stated:

> Insofar as the step-up clause covers assumption of a defaulting participant's share in the "dry hole" risk, that is to say, in the eventuality of a total failure of the projects, it may be argued to be a "guarantee" of the defaulting participant's debt rather than purchase of an increased share of project capacity such a guarantee may be beyond the city's respective authorities.

The court, however, left the question open by reasoning the step-up clause constituted a contingent promise to take an increased share of power or power capability, which would not necessarily be an impermissible guarantee "at the time of contract." *Id.*

The court noted that:

---

[2] For general background information on the step-up provision and the financing of so-called joint action projects involving "take-or-pay" provisions, see the pre-filed testimony of Eugene W. Devlin, filed June 2, 1986.

> Whether there are defenses arising out of developments subsequent to the cities and districts' initial entry into the agreements is not before us in this appeal.

That reasoning is equally applicable to the Vermont participants. There has been no showing of any step-up thus far. The non-occurrence of a default condition may discharge a step-up duty. Restatement, Second, Contracts section 225. Any additional obligation incurred by a Vermont participant as a result of section 12(d) may or may not result in additional energy being supplied to that participant. Somewhat analogous to this situation is the proposition that where a contract could have been performed in a legal manner as well as an illegal manner, it will not be declared void because it might have been performed in an illegal manner. 17 AmJur2d Contracts section 159.

## PSB RATEMAKING POWERS

Plaintiffs claim that section 5c and 5f of the PSAs have the legal effect of forcing the PSB to approve utility rates of the participants in order to avoid breach of contract by the participants of those sections and that such forcing of the PSB in effect usurps the ratemaking authority of the PSB. By agreeing to collect revenues sufficient to meet their obligations under the PSAs, plaintiffs argue that the utility deny the PSB the alternative of prospectively reviewing matters for which rate increases are sought. The defendants say that PSB ratemaking is an implied term of the PSAs and that the PSAs do not purport to deny that function.

The existence of the PSAs may be a factor in the PSB's decision. The parties are dependent on rates to pay their obli-

gations under the PSAs. Therefore, if a sufficient rate is not allowed, the obligation may not be paid.

Nothing has been shown by plaintiffs to suggest that the PSB could not deny rate requests of a participant even if it meant the inability of a participant to meet its PSA obligations. The PSA does not usurp the ratemaking powers of the PSB.

## CONSTITUTIONAL VIOLATIONS

Plaintiffs' claims under the 5th and 14th Amendments to the United States Constitution relating to ratepayers' right to due process are not clear. Absent state action, a claim under these provisions cannot succeed. *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 349-350 (1974). 16 AmJur2d, Constitutional Law, section 822.

Even if the PSAs are somehow state action, the plaintiffs have not shown a cognizable property interest which has been "taken". Any rate increases resulting from the PSA obligations are subject to PSB review with notice and opportunity for hearings. 30 V.S.A. section 225, 226.

Plaintiffs also claim that the PSAs violate Chapter I, Articles 1, 2, 4 and 9 of the Vermont Constitution. Plaintiffs claim interference with ratepayer rights as citizens to be protected in the enjoyment of their property and to have recourse to the law when they are not. The cited provisions of the Vermont Constitution simply do not confer on ratepayers a right to successfully challenge every "bad deal" undertaken by utility management. Any "bad deal" may cost ratepayers money. This court having concluded that the statutory rights of ratepayers have not been abridged by the PSAs and that procedural due process requirements are met by existing rate-making safeguards, it declines to apply the Vermont Constitution as plaintiffs request.

Plaintiffs also claim that the PSAs resulted in taxation without public benefit contrary to Chapter I, Article 9 of the Vermont Constitution.

Because rates are like taxes, the argument goes, Chapter I, Article 9 should apply. In *DeFazio* v. *WWPPS, supra*, 1332-33, the court rejected a similar argument in a different context.

> We do not accept the opponents' argument that utility rates in fact are equivalent to taxes because they have a comparable economic impact on ratepayers. Any charge for a public service reduces the user's disposable funds much as taxes do; . . . Charges for these necessities are not inescapable in the same sense as taxes are. This is what makes general obligation debt preferable to creditors and correspondingly cheaper. At some point it may become too expensive to drive or park a car, to attend a college, to water a lawn; and it also is possible to reduce one's consumption of electricity to substitute another fuel, or in the case of a plant or institution, perhaps even to generate one's own eletricity. If an unforeseen event prices too many users out of the market for the service, the creditor also loses the only source of repayment. In equating a commitment of future rates, expensive as it may prove to be, to a pledge of future taxes, the opponents simply attack the "special fund" premise of this long-established line of decisions in another way.

The inescapability of taxes distinguish them from rates. Plaintiffs have not suggested any compelling authority for the proposition that the Vermont Constitution should apply to rates as well.

Article 9 speaks to tax laws. This action challenges contracts, the PSAs. Because contracts are not laws Article 9 is not apposite.

## ONE HUNDRED PERCENT PARTICIPATION ISSUE

It appears to the court that the Plaintiffs' claim of lack of 100% participation in the PSAs is dependent on Plaintiffs prevailing in one or more of the issues hereinabove disposed of. Inasmuch as plaintiffs did not so prevail, their claim on the 100% participation issue is without merit.

## ORDER

Based upon the findings of fact and conclusions of law, it is hereby ORDERED AND ADJUDGED that:

1. The parties in this litigation that are participants in the Massachusetts Municipal Wholesale Electric Company Project No. 6 Power Sales Agreement had statutory authority to enter into these Power Sales Agreements.

2. These Project No. 2 Power Sales Agreements do not constitute an unlawful delegation of authority by the Vermont participants.

3. The Project No. 6 Power Sales Agreements do not violate Vermont statutory law on incurring debt or issuing evidences of indebtedness.

4. The Project No. 6 Power Sales Agreements are not a pledge, assignment, or hypothecation of all or any part of the net earnings or profits of the Vermont participants.

5. The Project No. 6 Power Sales Agreements did not require voter approval of the participating Vermont municipalities or member approval of the participating Vermont Cooperatives.

6. The Project No. 6 Power Sales Agreements did not require approval of the Vermont Public Service Board under 30 V.S.A. section 108.

7. The Project No. 6 Power Sales Agreements do not contravene the ratemaking authority of the Vermont Public Service Board.

8. The Project No. 6 Power Sales Agreements do not deprive the Vermont participants of any rights secured to them under the Vermont or United States Constitutions.

9. Count 11 of Plaintiffs' Complaint is DISMISSED.

The court determines that there is no just reason for delay of entry of final judgment as to the issues hereinabove adjudicated, and accordingly, as to those issues, the court hereby directs that entry of final judgment be made.

DATED: November 26, 1986 _____

JOHN P. MEAKER, Superior Judge